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LOUIS PILTAVER,

Appellant,

v.

VOJN DJUKOVICH,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.



MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Louis Piltaver brought suit in the Circuit Court of Cook County against Vojn Djukovich to recover for personal injuries suffered by the plaintiff and which he alleged were caused by a collision between an automobile driven by him and one driven by the defendant. The jury's verdict was for the defendant. Judgment was entered on the verdict and the court overruled the post-trial motion of the plaintiff. From that judgment the plaintiff now appeals.

The plaintiff contends that the verdict is against the manifest weight of the evidence and that a certain instruction was offered by the plaintiff and improperly refused by the court and another instruction was erroneously given by the court on behalf of the defendant.

The accident occurred on October 4, 1954 at about 12:30 a.m. at the intersection of South Chicago Avenue and Harbor Avenue in the City of Chicago. This intersection is of the type commonly referred to as a "T" intersection. South Chicago Avenue, which is approximately 40 feet wide, runs in a northwest-southeast direction, and Harbor Avenue, also approximately 40 feet wide, runs in an east-west direction at its intersection with South Chicago Avenue. For someone driving westerly, Harbor Avenue ends at the intersection. Railroad viaducts cross South Chicago

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Avenue both to the north and to the south of this intersection. The viaduct with which we are concerned is 20 feet south of the south curb line of Harbor Avenue. It has 6 support pillars, located in the center line of the road, which pillars are separated by a space approximately 6 to 7 feet. The passageway on either side of this row of pillars, for north or south traffic, measures approximately 20 feet from the pillars to the respective curb lines. The first, or most northerly pillar, is striped and has a warning light on it. There are lights under the viaduct.

Just prior to the accident the plaintiff was driving his automobile west on Harbor Avenue. He had as passengers Dagnillo and Esposito. The plaintiff testified that when he reached the intersection he came to a complete stop at the east curb line of South Chicago Avenue, at which time he was then next to the center line of Harbor Avenue, and that he looked both ways and saw the defendant's car about 300 feet away. Dagnillo estimated the car to be 200 feet away. The plaintiff then proceeded to make a left turn to go south on South Chicago Avenue. At that time he was driving at a speed of 15 miles an hour and by the time he entered under the viaduct he had increased his speed to 20 miles an hour. The plaintiff estimated that the rear of his car was between the first and second pillars of the viaduct and that he was about 2 feet west of the row of pillars when the defendant's car struck the back of the plaintiff's automobile.

The defendant testified that he was driving south on South Chicago Avenue in the lane next to the west curb, at an estimated speed of 25 to 30 miles an hour. He stated that the

first time he saw plaintiff's automobile was when it was barely 25 feet away from him and that the lights on the plaintiff's car were lighted. He further testified that the plaintiff's car was stopped under the viaduct and that he attempted to pass it on the right and would have been able to pass it if the plaintiff had not suddenly pulled out in front of him.

The plaintiff and Dagnillo deny that their car was stopped or that plaintiff pulled out of the lane in which he was driving.

The defendant stated that when plaintiff pulled out in front of him he (defendant) blew his horn and applied his brakes but was unable to avoid the collision. The left front of the defendant's car struck the right rear of the plaintiff's car, knocking it into the third pillar under the viaduct so that when the car stopped it was facing in a southeasterly direction. The defendant's ^{car} came to rest with its right rear against the west curb of South Chicago Avenue, with the front of the car behind the plaintiff's car, thereby blocking the southbound lanes of the street.

A witness, Angotti, testified that he was a passenger in an automobile being driven south on South Chicago Avenue, that the defendant's car passed his car on South Chicago Avenue a block and a half from Harbor Avenue, and that at that time the defendant's car was traveling at 40 to 45 miles an hour.

There was conflicting testimony concerning the presence or absence of a stop sign controlling traffic on Harbor Avenue. The police officers who came to investigate the accident, the plaintiff, and the plaintiff's witness, Dagnillo, testified

that no stop sign was there. A city bureau of traffic employee testified, however, that the city records indicated there was a stop sign at the intersection.

The plaintiff introduced as a witness a court reporter who transcribed a statement made by the defendant prior to the trial. The court reporter read from his notes and testified that at that time the defendant stated he did not know how far the plaintiff's car was from his when he first saw him; that at the time when the plaintiff's car started from its stopped position in the street the defendant's car was 200 feet from the plaintiff's car and he said that he thought the plaintiff was going to stop; and that he, the defendant, was blowing his horn.

In a case such as this it is the duty of the jury to reconcile the conflict in the testimony of various witnesses and to render a verdict based upon the evidence which they determine to be the most credible. In order for this court to set aside their verdict it is necessary that we find it to be against the manifest weight of the evidence. The evidence is in sharp conflict. The judge in the trial court had the opportunity of seeing the witnesses and hearing them testify and has placed his stamp of approval on the verdict by overruling the post-trial motion of the defendant. We cannot properly say that the verdict is against the manifest weight of the evidence. Had the jury found for the plaintiff we would perforce reach the same conclusion.

The plaintiff also objects to an instruction offered by the defendant and given by the court. The instruction is

as follows:

"There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that:

"'No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety.'

"If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all other facts and circumstances in evidence in determining whether or not a party was contributorily negligent before and at the time of the occurrence."

At the time of the conference on instructions the plaintiff objected to the instruction on the ground that it had no application to the case, and argued that the statute referred to vehicles which were stopped for a lengthy period or parked, and that in the instant case the defendant's evidence was that the car of the plaintiff had come to a stop during the time when he was making a left turn. The court stated that he had indicated the day before, during the conference, that he had thought the contention of the plaintiff was correct but nevertheless he would give the instruction.

The instruction quotes section 64 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. chap. 95-1/2, par. 161). This section is headed "Starting parked vehicle." There are various other sections in the same Act dealing with vehicles turning left at intersections; vehicles entering through highway, stop intersection, or stop crosswalk; the stopping of vehicles at through highways; and the right of way rules with reference to vehicles approaching or entering intersections.

In the case before us the defendant in his testimony has given different versions of the accident. The first version

was given by him when he was called as an adverse witness. At that time he stated that when he was a block and a half from where the accident happened he did not see any other automobile on the street; that he did not know how far he was from the plaintiff's car when he first saw it but that the plaintiff's car was in the middle of South Chicago Avenue, stopped right in the center under the viaduct facing to the west; that he did not pass the automobile while it was standing still; and that the plaintiff pulled in front of his car. When he testified on his own behalf he stated that when he got to the viaduct the plaintiff's car was on South Chicago Avenue in the intersection between the two viaducts; that when he was 15 or 20 feet away he blew his horn and at the time that he did it the plaintiff pulled out; that the plaintiff's car was making a turn which was more of a wide curve; that at the time he (defendant) was going 25 or 30 miles an hour; and that at the time when the defendant blew his horn the car of the plaintiff was moving. The defendant also testified that he ran into the back and right side of the plaintiff's car and at that time the plaintiff's car was going south in the same direction that the defendant was going and was under the viaduct almost in the center; and that the plaintiff's car had been coming from Harbor Avenue and had stopped right in the center of the viaduct. It is evident from this evidence that the plaintiff at the time of the collision was in the process of making a left turn. No other instructions were given on the right of way.

In the case before us it is impossible to determine from the defendant's testimony where the plaintiff's car was at the time of the accident or what he was doing. An instruction

of this type should be given only where the evidence would support a finding that the injury complained of was proximately caused by the violation of the statute. We do not think the evidence here is of that character. Nor do we think that this particular statute was intended to apply to the circumstances presented in this case. The instruction should not have been given.

The plaintiff also complains that the court erroneously refused to give an instruction offered by him. This instruction is as follows:

"If you find from a preponderance of the evidence that plaintiff stopped the automobile he was driving as near the north right of way line of South Chicago Avenue as possible, and at the time he started to cross and turn south on South Chicago Avenue, vehicle traffic on South Chicago Avenue was at such a distance from the intersection that it would not if driven at a reasonable speed, have reached the intersection before plaintiff, if driving with ordinary care would have safely crossed and turned south into said intersection, then you are instructed that plaintiff had the right of way."

The instruction is similar to an instruction given in Emond v. Wertheimer Cattle Co., Inc., 19 Ill.App.2d 389, 153 N.E.2d 870. However, that case dealt with a collision at an intersection of the ordinary type and not of the "T" type which we have in the case before us.

Section 70 of the Act regulating traffic (chap. 95-1/2, par. 167), provides in subsection (c):

"The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but then may proceed."

The evidence is uncontradicted that the plaintiff stopped before he entered South Chicago Avenue. It is immaterial whether he stopped in obedience to a stop sign or not. As we pointed out, there is some conflict in the evidence as to whether or not there was a stop sign at the time and place in question. The duty placed upon the plaintiff when he enters an intersection where there is a stop sign is that he shall stop and, after having yielded to vehicles which are either within the intersection or approaching so closely as to constitute an immediate hazard, he then may proceed with caution. Section 68(a) of the Act (chap. 95-1/2, par. 165(a)) provides that the driver of a vehicle approaching an intersection, where there is no stop sign, shall yield the right of way to a vehicle which has entered the intersection from a different highway. The instruction offered was a proper instruction and should have been given.

Defendant raises a point that the instruction is improper inasmuch as it impliedly designates South Chicago Avenue as running north and south whereas it runs at a slight angle. We do not think that this deviation would have confused the jury.

Where a case is close it is essential that the jury be properly instructed. In Sims v. Chicago Transit Authority, 7 Ill.App.2d 21, 129 N.E.2d 23, we said:

"It is elementary that every party has the right to have the law applicable to his case stated fairly, clearly, distinctly and conveyed to the jury with substantial accuracy so that it may not be misled to the prejudice of the party. Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499; Illinois Cent. R. Co. v. Maffit, 67 Ill. 431, 435; Chicago & A. R. Co. v. Robinson, 106 Ill. 142, 144-5; Lyons v. Joseph T. Ryerson & Son, 242 Ill. 409, 416; Chicago City Ry. Co. v. Canevin, 72 Ill. App. 81, 83; West Chicago St. R. Co. v. Schenker, 78 Ill. App. 592, 593; Gibbons v. Southern Illinois Ry. & Power Co., 199 Ill. App. 154, 161; Seley v. Eckhardt, 233 Ill. App. 584; Elmore v. Cummings, 321 Ill. App. 234; and cf. Townsend v. Chicago Transit Authority, 1 Ill.App.2d 77,

83. He has the right to have the jury instructed upon his theories of recovery or defense. Chicago, B. & Q. R. Co. v. Warner, supra; Chicago Union Traction Co. v. Mee, 218 Ill. 9; Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478; Young v. Illinois Cent. R. Co., 319 Ill. App. 311, 323; Elmore v. Cummings, supra. Failure to give a party these rights which are tantamount to a fair and just trial, whenever the case is close upon its facts or the evidence conflicting, and the failure is material, requires that the verdict be set aside, the judgment reversed and the cause remanded for new trial."

Here the evidence was conflicting and the case was close. The instruction given by the court was not in accord with the theory advanced by the defendant as a basis for the accident, i.e., that the plaintiff's vehicle, standing in the middle of South Chicago Avenue, turned directly into the lane in which the defendant was traveling. The instruction refused by the court correctly sets out the theory of the plaintiff. The giving of the one instruction and the failure of the court to give the other instruction in our opinion might have been the basis for the jury's reaching the verdict which it did.

The judgment of the trial court is reversed and the cause remanded for a new trial.

Reversed and remanded.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

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PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

APPEAL FROM

v.

JOHN ADAMS,

Defendant-Appellant.

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An information charged that on December 20, 1961, John Adams unlawfully carried concealed on or about his person a 25-caliber automatic pistol. In a trial without a jury on a plea of not guilty the court found the defendant guilty as charged in the information, fined him \$25 and suspended the fine. He appeals.

The defendant, married and the father of three children and with a good reputation as a peaceable and law-abiding citizen, was driving to his house in Chicago at about 1:30 A.M., Wednesday, December 20, 1961, when two police officers in an automobile patrolling the area, required the defendant's car to stop. The police officers were on the lookout for a burglary suspect driving a compact car of the type defendant was driving. The defendant got out of his car. An officer searched the automobile and found a 25-caliber loaded pistol on the floor in front of the front seat. The policeman who made the search testified that the gun was lying on the floor of the car on the driver's side immediately in front of the front seat, and that upon his arrest defendant said that he had the gun for protection.

Defendant had been the manager of a well-known bowling alley with a good reputation for six years. Defendant and the proprietor of the bowling alley testified that the proprietor requested the

defendant to purchase a gun "for protection" as they had been having trouble with rowdies at the bowling alley. The proprietor paid for the gun. It appears from the testimony that when the defendant left the bowling alley to go home he did not realize that he had the gun in his possession. When he discovered that he had the gun, he shoved it under the front seat. It was well under the front seat at the time he stopped his car on command of the police. He thought that when he suddenly applied his brakes the gun slid forward on the floor from its position under the front seat. He is a stout man and cannot readily reach down from his position behind the wheel.

The defendant is charged with carrying a pistol concealed on or about his person. At the time defendant was stopped by the police the gun was not accessible nor was it concealed on or about his person. See *People v. Liss*, 406 Ill. 419; *People v. McClendon*, 23 Ill. App.2d 10, 11. The gun was inaccessible. Defendant could not have grasped it without opening the door of the compact car he was driving. Under the law and the evidence the defendant should have been acquitted.

The judgment entered in this case is unusual in that it is followed by the words "fine suspended." In criminal law the terms "sentence" and "judgment" are generally synonymous and denote the action of the court formally declaring the legal consequence of the guilt which the accused has confessed or of which he has been found guilty. 24 C.J.S. Criminal Law, Sec. 15, page 380. The general rule is that in the absence of statutory authority, the court has no power indefinitely to suspend the execution of its sentence, and that any such order made after

judgment, or as a part thereof, is to that extent void. 24 C.J.S. Secs. 16-18(1), page 868. The only suspension of sentence authorized in Illinois is given in the probation act. People v. Wright, 296 Ill. 455, 462. Should the order suspending the fine be considered a vacation of the judgment, the case would be pending and there would be no judgment from which to appeal. In the instant case we choose to view the suspension of the fine as beyond the power of the court and a nullity. Under this assumption the defendant has a right to appeal from the final judgment.

For the reasons stated the judgment is reversed and the cause is remanded with directions to find the defendant not guilty and to enter judgment for him.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., and FRIEND, J., concur.

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PAUL V. WUNDER
Clerk Appellate Court Second District

No. 11612

Publish Abstract Only

Agenda 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

OCTOBER TERM, A. D. 1962

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. CITIZENS BANK AND TRUST)
CO., as Trustee under Trust Nos.)
148 and 126, and JOSEPH A.)
NICOSIA,)

Plaintiffs-Appellees,)

vs.)

ROBERT I. WARD, Chairman; RAYMOND)
BENSON, WILBUR F. BREDEHORN,)
JAMES E. CLAYSON, CHARLES F.)
HAMILTON, STUART LIBBY, and)
HARRY W. WILANT, members of the)
Plan Commission of the Village of)
Itasca, Illinois,)

Defendants-Appellants.)

Appeal from
Circuit Court of
DuPage County.

WRIGHT, -- P. J.

A complaint was filed in the Circuit Court of DuPage County by the plaintiffs for a Writ of Mandamus to command and direct the defendants, members of the Plan Commission of the Village of Itasca, Illinois, to approve the plaintiffs' plan of development of a subdivision which is to be located

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within a one and one-half mile radius of the corporate limits of the Village of Itasca. The defendants refused to approve the plaintiffs' plan of subdivision on the ground that it did not comply with the applicable subdivision ordinances of the Village of Itasca or the zoning ordinances of the County of DuPage.

On November 22, 1961, the trial court entered a judgment finding that the plaintiffs had substantially complied with all of the requirements of the subdivision ordinances of the Village of Itasca and ordered the issuance of a Writ of Mandamus commanding and directing the defendants to approve the plan of plaintiffs' subdivision as theretofore submitted to them. From this judgment defendants appeal.

Plaintiffs-Appellees' motion to dismiss this appeal was taken with the case and is hereby denied.

Plaintiffs-Appellees have filed no brief in this court. On this state of the record, we would be justified in reversing and remanding the cause without further discussion. *Eckells v. City Council of City of East St. Louis*, 23 Ill. App. 2d 360, 163 N. E. 2d 107.

If this cause is considered on the merits it still must be reversed and remanded.

The record in this case discloses that the subdivision in question is located in DuPage County and within one and

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one-half miles of the corporate limits of the Village of Itasca.

On September 2, 1958, the President and Board of Trustees of the Village of Itasca, Illinois, passed Ordinance No. 121-58 being the subdivision regulations of the village. This ordinance contained provisions and regulations governing the subdivision and platting of lands in the Village of Itasca and in the area one and one-half miles beyond the village limits. The restrictions were adopted to provide for the orderly and harmonious development of the Village. This ordinance also provides that the final plat of a subdivision shall be submitted to and approved by the Plan Commission of the Village.

The Board of Supervisors of DuPage County has also passed an ordinance for the same purpose, and has also passed another ordinance being the DuPage County Zoning Ordinance. The latter ordinance requires one acre lots where provisions are not made or provided for a common system of sanitary sewers and domestic water supply including community domestic water plant, and/or community sewage treatment plant.

The validity of these ordinances is not questioned in this litigation.

Plaintiffs are the owners of a tract of land within one

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and one-half miles of the village limits of the Village of Itasca which they propose to subdivide.

The Plan Commission of the Village of Itasca refused to approve the final plat of the subdivision for various reasons which are set forth in two resolutions. One such reason was that the proposed plan of subdivision provided for in excess of two lots to the acre without plans and specifications for a community treatment for sewage such as a sewage treatment plant.

The plaintiffs contend that they have substantially complied in all respects with the requirements of Ordinance No. 121-58, being the Subdivision Regulations of the Village of Itasca, and that the Plan Commission arbitrarily refuses to approve their final plat.

The Writ of Mandamus is one of the extraordinary remedies provided by law and should never be awarded unless the party applying for it shows a clear right to have the thing sought by it done. In doubtful cases, it should not be granted. *Swift v. Klein*, 163 Ill. 269. One applying for mandamus must show first that he has a clear legal right to have the thing which is asked for done and that it is the clear legal duty of the party sought to be coerced to do the thing he is called upon to do. *Chicago & Alton Railroad Co., v. Suffern*, 129 Ill. 274.

The Plan Commission of the Village of Itasca, defendant herein, had no duty to approve subdivision plans which were not in strict compliance with the ordinances of the village and before applying for the Writ of Mandamus, the plaintiffs should have tendered the Commission plans which complied with the requirements of the ordinances of the village and in the absence of complete compliance a court is without authority to issue a Writ of Mandamus. People ex rel. Younger v. City of Chicago, 280 Ill. 576; Walter Rogers Inc., v. Mortimer, 19 Ill. App. 2d 381, 153 N. E. 2d 895.

From an examination of the record in this case, it appears that the plaintiffs have failed to show that they have fully complied with the subdivision ordinances of the Village of Itasca. In fact, the order of the trial court appealed from finds that the "plaintiffs have substantially complied with all of the requirements of the subdivision regulations of the Village of Itasca relative to the proposed Golden Gate Estates Subdivision."

Substantial compliance with the requirements of the subdivision regulations is not sufficient for the awarding of a Writ of Mandamus directing the defendants to approve the plan of plaintiffs' subdivision, but before the Writ will issue, plaintiffs must show a complete compliance by them

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

with the subdivision regulation ordinances. This they have not done and the trial court in its order did not find that there had been complete compliance with the subdivision regulations but only found that there had been a substantial compliance and a substantial compliance is not sufficient to justify the issuance of a Writ of Mandamus.

The judgment of the Circuit Court of DuPage County is reversed and remanded with directions to quash the Writ of Mandamus heretofore issued.

Judgment reversed and remanded with directions.

J. C. C. C.
Concurs
Spencer J. Concurs

General Agent

Journal

General No. 11631

Agenda No. 2

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

October Term, A.D. 1962

FILED
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EDWARD J. KIDERA.

Plaintiff-Appellee,

vs.

BETH SCOFIELD.

Defendant-Appellant.

Appeal from the
Circuit Court of
Lake County.

DOVE, J.

On May 19, 1959, the Circuit Court of Lake County rendered a decree of foreclosure and sale. This decree found that the amount due Edward J. Kidera, the plaintiff, was \$18,148.48 with interest thereon at 5% per annum from May 19, 1959; that Beth Scofield was personally liable for the payment thereof and directed that unless the amount so found due plaintiff was paid within twenty-five days from the date of the entry of the decree, that the mortgaged ^{premises} be sold by a special master in chancery who was appointed by the decree to execute it.

The special master thereafter, and on August 7, 1959, filed his report, reciting that the amount found due plaintiff by the decree of May 19, 1959 had not been paid and that he executed the decree by selling, as provided in the decree, the premises therein described to the plaintiff, Edward J. Kidera,

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for \$18,679.57 on July 17, 1959. This report of sale and also the special master's report of distribution were duly approved by the court on August 7, 1959. This report of sale recited that the amount due the plaintiff on the day of sale was \$18,679.57; that the moneys derived from the sale were sufficient to pay the amount due plaintiff, with interest, costs and expenses of said sale; that purchaser, being the owner of the indebtedness evidenced by the note secured by the foreclosed mortgage paid the special master the unpaid balance of the taxed costs and that he, the special master, delivered to him a certificate of purchase as directed by the decree and as provided by law, ^{and} that he filed a duplicate thereof in the office of the Recorder of Deeds, as provided by law.

On July 22, 1960, Beth Scofield filed her petition in this cause and thereafter filed an amended petition. On September 29, 1961 she filed her second amended petition. In this second amended petition she referred to the foreclosure proceedings and among other things, alleged that on December 9, 1955 she purchased from Kidera the 15 acres described in the foreclosure complaint for \$42,500.00; that she paid Kidera \$21,000.00 and executed her note for the balance and secured its payment by the trust deed which had been foreclosed in this proceeding. The petition then alleged that a decree of foreclosure and sale was rendered on May 19, 1956; that a sale was had on July 17, 1959; that Kidera was the purchaser at the sale and received a certificate of purchase from the special master. It was then alleged that on July 7, 1960 prior to the expiration of the period of redemption, petitioner represented to Kidera that she was prepared to redeem the property; that she had made arrangements to procure the funds necessary to do so; that she was prepared to

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deliver said funds upon the surrender or assignment of the certificate of sale; that she desired assignment of the certificate of sale made to her agent or nominee for convenience in completing the transaction; that the sum of \$20,000.00 was agreed upon between the parties as the amount necessary to effect the redemption and that Kidera instructed petitioner to deposit said amount with his attorney, Joseph N. Sikes and that upon that being done, he, Kidera, would instruct his attorney to prepare an assignment of said certificate to petitioner's agent and nominee; that thereafter petitioner retained Louis Behm, a real estate broker, to so act for her as her agent and nominee and that on July 16, 1960 Kidera represented to petitioner and to said Behm that the assignment would be prepared and ready for delivery on July 18, 1960, the last day of said redemption period.

The second amended petition then averred that on July 18, 1960 petitioner, by her agent, Behm, tendered to Kidera a bank money order for \$20,000.00 which was accepted by Sikes, plaintiff's agent and attorney, upon the representation that Kidera would execute and deliver an assignment of said certificate of sale to Behm on or before July 20, 1960; that these representations were false, known by Kidera to be false as he, Kidera, did not propose to assign the certificate of sale to petitioner or her agent or nominee and that said representations were made for the purpose of deceiving and defrauding petitioner who was ignorant of the falsity of such representations.

affixed with hands and the necessary or signature of the
certificate of sale; that the duties assigned of the certificate
of sale were to be given at once for consideration in
conforming the transaction; that the sum of \$10,000.00 was
applied upon the terms of the same agreement to effect
the redemption and that the said interest was to be paid
and amount with the interest, \$10,000.00 and that upon
that being done, the said, would be paid to the
property an assignment of said certificate to the said
and advised that the said interest was to be paid, and
a new certificate, to be paid for not at the same time and advised
and that on July 11, 1900, the said interest was to be paid and
to said that the assignment would be made and that
for delivery on July 11, 1900, the said day of said redemption
period.

The second month ending July 11, 1900, was an
July 11, 1900, redemption, by the said, and, according to the
a bond being given for \$10,000.00, which was received on July
first of the said month, and the said, upon the redemption of the
said, would execute and deliver an assignment of said
certificate of sale to the said on or before July 11, 1900, and cause
redemption of the said, and the said, would be paid to the
said, the said property to be paid, the certificate of sale to
condition of the said of the said and that the said redemption
were made for the purpose of obtaining and delivering said
the said amount of the said of the said.

The amended petition then alleged that Kidera after the expiration of the period of redemption refused to execute and deliver an assignment of the Certificate of Sale to petitioner or to her agent, and charged that by reason thereof petitioner has been damaged in excess of \$40,000.00. The petition further averred that the special master had executed a deed to Kidera on May 15, 1961 which was, on ~~January~~ ^{June} 20, 1961, duly recorded.

The prayer of the petition was that this special master's deed be set aside; that Kidera be ordered to convey his interest in the property described therein to petitioner, upon payment of the redemption price plus interest, costs and fees and that, in default thereof, a special master be appointed to make such conveyance.

Edward J. Kidera answered this second amended petition admitting the institution of the foreclosure proceedings and the rendition of a decree of foreclosure and sale and the issuance of the special master's deed and the recordation thereof, as set forth in the amended petition. Substantially all the other allegations of the amended petition were denied. A reply was filed and the issues made by the pleadings were heard by the chancellor who, following the conclusion of the evidence and the arguments of counsel, stated that petitioner had not proved her case and accordingly he dismissed the amended petition and denied petitioner the relief sought. To reverse the judgment order, based upon these findings of the chancellor petitioner has appealed.

The enclosed petition then alleged that Wilson after

the expiration of the term of commission refused to resign.

and deliver an affidavit of his qualifications to hold office

or to act as agent, and thereby lost all manner thereof, petitioner

has been damaged in excess of \$41,000.00. The petition further

averred that the special master had executed a deed to Wilson on

May 22, 1921 which was, on February 12, 1921, duly recorded.

The prayer of the petition was that this Honorable

master's deed be set aside; that Wilson be ordered to convey

his interest in the property described therein to petitioner,

upon payment of the commission thereon with interest, costs and

fees and that, in default thereof, a judicial sale be conducted

to raise such moneys.

Whereas it is not stated in this petition whether

petitioner has instituted in the appropriate tribunals and the

petitioner of a writ of habeas corpus and writ and the petition

of the special master's deed and the recording thereof, as

was done in the enclosed petition, respectfully all the

proper allegations of the petition which were stated, a writ

was filed and the issues made by the petition were heard by the

commission and, following the conclusion of the evidence and the

assessors of counsel, stated that petitioner had not proved her

case and accordingly an official and signed order was issued

petitioner the relief sought. To remove the foregoing error,

based upon these findings of the Honorable Master's deed

repeated.

Upon the hearing petitioner testified that in December, 1955 she purchased of Kidera 20 acres of land for \$42,500.00; that she paid \$21,500.00 and executed a note for the balance which was secured by a trust deed; that on January 5, 1958 she paid \$2,000.00 on the note and on May 13, 1958 paid an additional \$4,000.00 and secured a partial release for 5 acres upon which a motel was thereafter erected. She further testified that, accompanied by Ruth White, she went to the home of Kidera on June 13, 1960; that they went to see him about another matter but in their conversation she told Kidera that she was attempting to borrow money and redeem the foreclosed property; that she inquired where she could reach him as he was seldom home; that Kidera then said "Fine, when you get the money and are ready to redeem, go see Joe Sikes, you know him, he is my attorney and he has all the papers and he will take care of the assignment of the certificate to your nominee".

Petitioner further testified that subsequently she made an arrangement to borrow \$20,000.00 from Charles Kulacowski and that about seven o'clock on the morning of July 14, 1960 she had a conversation with Joe Sikes; that in that conversation she told Sikes that Kidera had "agreed to assign the certificate and that I had to make sure and I wanted him to call Kidera before he left for work that morning and then be sure to call me back. I said that the Chicago Title and Trust Company, and that the lawyer that I had talked to, had suggested that I offer Kidera an additional \$200.00 to assign the certificate of sale to perfect title".

Petitioner further testified that Mr. Sikes called her back two hours later and said that Kidera said "it would be okay"; that petitioner then inquired of Sikes: "What will be okay?", and in reply Sikes said, "Kidera said it will be okay. He will accept the additional \$200.00 for the certificate of _____ for the assignment of the certificate of sale".

Upon the receipt of the petition, the following facts were ascertained:

1. The petition was filed on March 15, 1933, at Chicago, Illinois.

2. The petitioner is a woman, aged 35, residing at 1234 North Dearborn Street, Chicago, Illinois.

3. The respondent is a man, aged 38, residing at 5678 South Michigan Avenue, Chicago, Illinois.

4. The petitioner alleges that she and the respondent were married on January 1, 1928, at Chicago, Illinois.

5. The petitioner alleges that the respondent has been guilty of adultery and abandonment.

6. The petitioner alleges that she has been living in a state of separation from the respondent since March 1, 1932.

7. The petitioner alleges that she has been supporting herself and her two children, a son and a daughter, during the past year.

8. The petitioner alleges that the respondent has been guilty of neglecting his duties as a father and provider for his family.

9. The petitioner alleges that she has been injured in her health and reputation by the respondent's conduct.

10. The petitioner prays for a decree of divorce, alimony, and custody of her children.

11. The petitioner prays for costs of suit.

12. The petitioner prays for such other and further relief as the court may deem just and equitable.

13. The petitioner declares under oath that the foregoing is true to the best of her knowledge and belief.

14. The petitioner's signature is: _____

15. The petitioner's name is: _____

16. The petitioner's address is: _____

17. The petitioner's telephone number is: _____

18. The petitioner's occupation is: _____

19. The petitioner's date of birth is: _____

20. The petitioner's date of marriage is: _____

21. The petitioner's date of filing the petition is: _____

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This witness further testified that she told Sikes that she would have to have the certificate of sale assigned to her nominee, the money lender, in order to protect him; that she requested him to bring the certificate to the office of Mark Beaubien, the Master in Chancery, but that Sikes told her, "No, I will keep the certificate in my office".

Petitioner further testified that Charles Kulacowski informed her on Thursday, July 14, 1960 that he was unable to raise the money to loan her the \$20,000.00 he had promised; that on Friday, July 15, 1960 she contacted other parties in order to obtain the money she required; that on Saturday, July 16, 1960 she went to the office of Louis Behm and requested from him a loan of \$20,000.00 and he agreed to let her have this amount for which she agreed to pay him \$1,000.00 "for the use of his money for a short-term of 90 days;" that after this conversation petitioner and Behm, on Saturday morning, July 16, 1960 sought Sikes and found him at his home and Behm went in the house to talk to Sikes ~~xxxxxx~~ while petitioner remained in the automobile; that she had no conversation with Sikes that day; that on Monday, July 18, 1960 she went to Behm's office and received from him a check which she subsequently delivered to the Chicago Title and Trust Company.

As abstracted by her counsel this witness continued:

"The next conversation I had with anyone concerning this transaction was on Wednesday. Ruth White came to my home and we went to Louis Behm's office. The next day or so we saw Joe Sikes at his office. Ruth White and myself and Louis Behm, I think was there". This witness was then asked: "What did you say to Mr. Sikes and what did he say to you?" To this question she replied: "I asked Joe Sikes

This witness further testified that the said time

that she would have to have the certificate in order to get the money, and money lender, in order to get the money, she requested him to bring the certificate in the afternoon, and she received it, and then she told him, "I will have the certificate in my hand."

Petitioner further testified that during the time

informed her on Thursday, July 11, 1902, that she had to go to the bank to get the money, and she went to the bank, and she got the money, and she brought it back to the bank, and she told him, "I will have the money in my hand." She went to the office of Louis and he told her to go to the bank to get the money, and she went to the bank, and she got the money, and she brought it back to the bank, and she told him, "I will have the money in my hand."

for a short-term of 30 days; "I will have the money in my hand." Petitioner and Louis, on Saturday, July 12, 1902, went to the bank and found that the money was not there, and she told him, "I will have the money in my hand." She went to the office of Louis and he told her to go to the bank to get the money, and she went to the bank, and she got the money, and she brought it back to the bank, and she told him, "I will have the money in my hand." She went to the office of Louis and he told her to go to the bank to get the money, and she went to the bank, and she got the money, and she brought it back to the bank, and she told him, "I will have the money in my hand."

As indicated by the counsel that witness continued:

"The next conversation I had with Louis was on Sunday, July 13, 1902, and he told me that the money was not there, and she told him, "I will have the money in my hand." She went to the office of Louis and he told her to go to the bank to get the money, and she went to the bank, and she got the money, and she brought it back to the bank, and she told him, "I will have the money in my hand." She went to the office of Louis and he told her to go to the bank to get the money, and she went to the bank, and she got the money, and she brought it back to the bank, and she told him, "I will have the money in my hand."

why Kidera didn't take the money and why he gave such a receipt as he did to Louis Behm when we had already had a definite agreement for Kidera to assign the certificate". This question was then asked: "And what did Mr. Sikes say to you at that time?" She replied: "He said Kidera said the time limit of the redemption is past and he doesn't want to discuss it and as a result, Joe Sikes said he didn't want to discuss it any more".

Louis I. Behm testified that he was in the real estate business with offices located in Grays Lake, that he was acquainted with Beth Scofield; that on Saturday morning, July 16, 1960, he had a telephone conversation with her in which she stated she needed some help in redeeming her property; that between 10:30 and 11:00 o'clock that morning Mrs. Scofield came to his office and, following a conversation there, he and Mrs. Scofield went to Joe Sikes' office and Behm told Sikes he was acting on behalf of Mrs. Scofield, as her agent. Mr. Behm was then asked: "What did you say to him and what did he say to you about the assignment of this certificate of sale as collateral, if anything"? The witness answered: "Well, he said to me he had to get it signed by Mr. Kidera". The witness was then asked: "Did Mr. Sikes have any further conversation with you at that time relating to any conversation with Mr. Kidera on that subject"? The witness answered "Yes, I think he told me the only thing it was necessary to have the money there". The witness was then asked: "May I ask you to say, Mr. Behm, just what did Mr. Sikes say to you relating to his prior conversations with Mr. Kidera, if anything? What did Mr. Sikes say to you?" and the witness answered: "If the \$20,000.00 was brought in he would assign the certificate".

why Eiders didn't take the money and why he gave such a receipt
 as he did to Louis Eiders when he had a receipt for a telephone agreement
 for Eiders to assign the certificate. This receipt was then
 asked: "And what did Mr. Eiders say to you at that time?" The
 witness said: "He said Eiders said the time limit of the telephone
 is past and he doesn't want to discuss it and as a receipt, the
 Eiders said he didn't want to discuss it any more."
 Louis I. Eiders testified that he was in the room with
 business with offices located in New York, that he was
 acquainted with both Eiders; that on January 1, 1960, he
 1960, he had a telephone conversation with him in which the
 stated she needed some help in reviewing her accounts; that
 between 10:30 and 11:00 o'clock that morning the Eiders came
 to his office and, following a conversation with him, he and the
 Eiders went to the Eiders' office and there the Eiders was
 acting on behalf of the Eiders, as her agent. The witness
 then asked: "That did you say to him and what did he say to you
 about the assignment of the certificate of sale as discussed,
 if anything?" The witness answered: "Well, he said he was not
 sure it was signed by Mr. Eiders. The witness was then asked:
 "Did Mr. Eiders have any further conversation with you at that
 time relating to any conversation with Mr. Eiders on that subject?"
 The witness answered: "Yes, I think he said he was only going
 it was necessary to have the money there. The witness was
 then asked: "Say I ask you to say, Mr. Eiders, what did he
 Eiders say to you relating to the Eiders conversation with the
 Eiders, if anything? What did Mr. Eiders say to you?" The
 witness answered: "He said \$2,000.00 was assigned to the Eiders
 assign the certificate."

This witness, Louis I. Behm, further testified that on Monday, July 18, 1960, he went to the Bank of Antioch and got a draft for \$20,000.00 and that he took it to the office of Joe Sikes at Grays Lake and gave it to Sikes who receipted him for it. This receipt is dated July 18, 1960 and was received in evidence without objection and is as follows, viz:

"Received of Louis I. Behm, a certified check in the amount of Twenty Thousand Dollars (\$20,000.00) endorsed by him, This is for the purpose of securing an assignment of the special Masters Certificate of sale in Gen. No. 69767 of the Circuit Court of Lake County, Illinois. If Ed Kidera Sr. shall assign this certificate and deliver the same to Louis I. Behm on or before July 20, 1960, this check shall be turned over to Ed Kidera. Should Ed Kidera fail to assign and deliver the above certificate of sale by the above mentioned date, then this check shall be returned to Louis I. Behm.

Joseph N. Sikes".

"Sale refused
Check returned to Behm
on 7/19/60"

Upon cross examination this witness testified that he never talked to Mr. Kidera at any time, either before the receipt was issued or afterward, that the notation in the left hand corner "Sale refused, check returned to Behm on 7/19/60" was not in his handwriting; that when he left the check with Sikes he told him "I had to have the certificate or I wanted the money back". This witness further testified that about 9:15 o'clock the next morning, Tuesday, July 19, Sikes phoned him and said that Kidera refused to accept the money.

Joseph N. Sikes testified that he was a lawyer with offices in Grays Lake and that he represented Kidera in this foreclosure proceeding; that after the foreclosure sale he obtained the certificate from the Master and had it in his possession until the day after the expiration of the period of redemption.

[illegible][illegible][illegible]

1. The first question is: what is the nature of the evidence? The evidence is of two kinds: (a) the evidence of the fact of the crime, and (b) the evidence of the guilt of the accused. The evidence of the fact of the crime is of two kinds: (a) the evidence of the fact of the crime, and (b) the evidence of the guilt of the accused. The evidence of the guilt of the accused is of two kinds: (a) the evidence of the fact of the crime, and (b) the evidence of the guilt of the accused.

[illegible]

This witness further testified that on Wednesday, July 13, 1960 Mrs. Scofield came to his office and he had a conversation with her. The witness was then asked: "At that time did she state that she wanted to redeem her property and that she wanted to know if you would be in your office the next day so that she could come in and effect a redemption, and did you at that time tell her that you would be in your office and that she could come in and effect the redemption at that time?" The witness answered: "I don't believe she used the word 'redemption'. She said she would have the money the next day and come into my office. And I said that would be fine". He was then asked: "Did she state at that time that in addition to the \$18,000.00 necessary to effect the redemption that she desired to pay an additional \$200.00?" And the answer was: "She did". In reply to a further question, Sikes replied, "I asked her why she wanted to pay \$200.00 extra and she said that her attorney had advised her that if she paid \$200.00 extra, she would get our cooperation in turning over the title policy papers. And I said that is up to you and your attorney. It is all right with us".

This witness testified that on Saturday, July 16, 1960 Louis Behm told him that he was going to make a loan at the Antioch Bank to assist Mrs. Scofield; that Sikes then asked Behm whether he was going to buy the certificate or effect a redemption; that Behm replied that he had checked with the Chicago Title Company and they advised him that it would be better to take an assignment. "I told him (Behm)" continued this witness, "that as I understand it there were some law suits pending against Beth Scofield and I didn't know the effect of them and if there were any judgments involved that if he didn't take the assignment that he had better be careful. He said he was aware of that situation. He also told me he did not want to lose his money".

This witness further testified that on Wednesday,

July 12, 1936 Mr. Jacobelli came to his office and he had a conversation with her. The witness was then asked: "At that time did she state that she wanted to return her property and that she wanted to know if you would be in your office the next day so that she could come in and effect a redemption, and did you at that time tell her that you would be in your office and that she could come in and effect the redemption at that time?" The witness answered: "I don't believe she used the word 'redemption'." She said she would have the money the next day and come into my office. And I said that would be fine". He was then asked: "Did she state at that time that in addition to the \$1,000.00 necessary to effect the redemption that she desired to pay an additional \$200.00?" And the answer was: "She did". In reply to a further question, Baker replied, "I asked her why she wanted to pay \$200.00 extra and she said that her attorney had advised her that if she paid \$200.00 extra, she would get her redemption in writing over the title policy papers. And I said that is up to you and your attorney. It is all right with me." This witness testified that on Saturday, July 13, 1936 Louis Bern told him that he was going to make a loan at the Antioch Bank to assist Mrs. Jacobelli; that Bern then asked him whether he was going to buy the certificate or effect a redemption; that Bern replied that he had conferred with the Chicago title company and they advised him that it would be better to take an assignment. "I told him (Bern)" continued the witness, "that as I understood it there were some law suits pending against both Jacobelli and I didn't know the effect of them and if there were any judgments involved that if he didn't take the assignment that he had better be careful. He said he was aware of that situation. He also told me he did not want to lose his money."

Mr. Sikes further testified that about 3:00 o'clock in the afternoon of Monday, July 18, 1960, Behm came to his office and deposited with him a check for \$20,000.00 and when he did so Sikes executed the receipt hereinbefore referred to; that shortly thereafter, on the same afternoon, he had a telephone conversation with Kidera and in answer to this question, "What was said in the conversation?" Sikes replied: "Mr. Kidera called me and said he understood I was trying to reach him. I told him, yes, that I had a check for \$20,000.00 for an assignment of the certificate. He said, did he have to make the assignment, and I said no, that he didn't. And I told him that if I was to accept it (the check) on the basis of an assignment, why, he had two days in which to come in. If he didn't want to, why, then, that would be the end of the matter. He said he did not want to receive it, and I said, well, if they want to change it and make it a redemption, would you be home that evening? And he said he would be. I told him I'd get in touch with Louis Behm". The witness was then asked "When did you have a conversation after that with Louis Behm?", and the witness replied: "About five minutes afterward. I talked to Louis Behm about 20 minutes to five, Monday afternoon, July 18, 1960. I told him we were about ready to close the office, that I had just talked to Ed Kidera and he did not want to assign the certificate. I said if he wants to come back and pick up the check he can do so, and that Ed Kidera would be at his home that evening and if he wanted to make a redemption he can take it directly to Ed Kidera's home and present him the check to make the redemption".

This witness further testified that on the following morning he was not at his office but that Behm sent his office girl to Sikes' office and the check which had been delivered to Sikes, by Behm, the day before was picked up. Mr. Sikes further testified

at 3:30 p.m. on Monday, July 12, 1936, when he came to his

in the afternoon of Monday, July 12, 1936, when he came to his
office and happened to see a check for \$10,000.00 and when
he saw the check he knew it was a check for \$10,000.00 and when
that check was presented, at the same time, he had a conversation
concerning the check and he knew to this day, that
was said in the conversation. That fact is: "I told him that
we had said he was wrong, I was going to say it. I told him,
yes, that I had a check for \$10,000.00 for an assignment of the
certificate. He said, 'Oh, he says so about the assignment, and I
told him, that he was right. And I told him that if I was to receive
it (the check) on the basis of the assignment, now, he had the right
to refuse to come in. If he didn't want to, why, then, that would
be the end of the matter. He said he did not want to receive it,
and I said, well, if they want to change it and make it a reflection,
would you be home that evening? And he said he would be. I told
him 'I'd get in touch with Louis later'. The next day he then asked
"When did you have a conversation with that man with Louis later", and
the witness testified: "About five minutes afterwards, I called on
Louis and when he started to give, he said, 'Only 10,
1000'. I told him we were about ready to close the deal, that
I had just talked to Ed Lister and he did not want to accept the
certificate. I told it he would come back and then on the check
he said it was, and that Ed Lister would be at the bank that evening
and it was wanted to make a conversation of it with the treasurer".
Ed Lister's name was present in the check to make the transaction".
This witness further testified that on the following
morning he was at his office and that when he saw his office girl
to him, when she came and when he was talking to him,
by him, the day before was asked by Mr. Lister further certified

that he did not, at any time, discuss with Kidera anything about Kidera assigning the certificate to anyone, and denied that on July 16, 1960 he had stated to Behm that he had discussed the matter of the assignment with Kidera and that Kidera had agreed to it.

Ruth White, a friend of petitioner testified that on June 13, 1960 she and appellant were in the sun porch, off the garage, at Kidera's house; that in a conversation with Mr. Kidera, Mrs. Scofield told him that she was making arrangements to make the redemption and asked him about the certificate and Kidera told her that Sikes would assign the certificate to the money lender; that on Tuesday, July 19, 1960, she and appellant were at Sikes' office and that Mr. Sikes told her that there was no deal and refused to discuss the matter further. On cross examination this witness testified that the first conversation at Mr. Sikes' home lasted half an hour and that she remembers Mr. Kidera told Mrs. Scofield that she should see Mr. Sikes, his attorney or agent.

Appellee testified that the only conversation he ever had with Mrs. Scofield was in June 1960 at his house at which Ruth White was present; that this conversation lasted about forty-five seconds and had nothing to do with the foreclosure proceedings or sale and that there was no mention made about redeeming from the foreclosure sale or assigning the certificate of purchase. This witness further testified that he knew Louis Behm, recognized him when he was in court attending this hearing but had not seen him for five or ten years previous to that time; that the first time he learned that Mrs. Scofield or Mr. Behm desired to procure an assignment of his certificate of purchase was the

telephone conversation he had with Sikes on July 18, 1960, as related by Sikes; that in that conversation he told Sikes he was not interested in selling the certificate; that at no time did he ever discuss with Sikes or anyone else any thing about extending the period of redemption or assigning the certificate of purchase.

We have set out the evidence quite fully inasmuch as counsel for appellant insists that it discloses that there was an agreement on behalf of Kidera to assign this certificate of purchase to Behm, appellant's nominee, that Kidera, at the last moment, breached this agreement and refused to do so. Counsel then argue that if there was no agreement to assign the certificate of purchase the chancellor erred in not holding that a redemption was actually effected on July 12, 1960 when Behm left with Sikes the cashier's check for \$20,000.00. To affirm the order of the trial court, says counsel, "would be to grant an affectionate judicial benediction upon a disproportionate benefit achieved by Kidera through circumstances clearly irregular, and obviously unfair, if not downright fraudulent. To reverse would be consonant with the underlying principles of equity and good conscience".

It is true, as appellant urges, that equity will grant relief where the purchaser at a mortgage foreclosure sale has, by fraudulent conduct, prevented the owner of the equity of redemption from redeeming within the statutory time. One seeking to redeem in such a case must allege and prove inequitable conduct on the part of the purchaser such as the making an oral agreement to permit the owner to redeem after the statutory period had run or inducing the owner of the equity to refrain from redeeming the property until after a suit involving the validity of the sale of the premises has been determined (Woodworth vs. Sandin, 371 Ill. 302, 307).

telephone conversation, he was with him on July 13, 1937, as related by him; that the conversation as told him by him was not interested in selling the certificate, but at the time he ever discuss the sale of the certificate or the sale of the property, the period of redemption or assignment of the certificate of redemption.

We have set out the evidence with fairly in detail as counsel for appellant desired that it be set out in detail. There was an agreement on behalf of the appellant to sell the certificate of redemption to him, and the appellant, that the appellant, in the last moment, procured this agreement and refused to let the appellant then argue that if there was no agreement in writing, the certificate of redemption was actually effected on July 13, 1937, and that a redemption was actually effected on July 13, 1937, and that the appellant left with the certificate of redemption on July 13, 1937, and that the appellant, on the other of the trial court, was wrong, and that the appellant an effectuated judicial redemption was a redemption to benefit achieved by him through circumstances, irregular, and otherwise unfair, it was not a redemption.

In reverse would be consistent with the evidence, and that the appellant and from conscience.

It is true, as appellant argues, that appellant will not testify that the certificate was a certificate of redemption, but that the appellant, through the action of the court of the equity of redemption from redemption within the meaning of the law, was seeking to reduce to zero the value of the certificate, and that the appellant on the part of the appellant such as the sale of the property to reduce the value of the certificate, and that the appellant has run on reducing the value of the certificate, and that the appellant regarding the property will when a sale involving the property of the sale of the property has been determined, and that the

Exhibit, Vol. 111, 201, 207.

We have read several of the cases cited and relied upon by appellant. In Black vs. Hooper 318 Ill. 183 it appeared that property worth in excess of \$12,000.00 was purchased at an execution sale for \$173.00. The court said that the rule is that where there are irregularities, fraud or circumstances of unfairness connected with such a sale, a court of equity may allow redemption upon equitable terms after the time for redemption has expired. The court held that because of the issuance of an invalid execution and the gross inadequacy of price the judgment debtor should be permitted to redeem his property. In Moore vs. Sibtherp, 395 Ill. 418 the property involved was valued at \$21,450.00 and was subject to a \$2500.00 mortgage. It sold for \$1714.00 subject to the mortgage leaving a net profit to the purchaser, the court said, of \$17,236.00. In affirming the decree of the circuit court which granted the wife of the judgment debtor the right to redeem but denying that right to the husband, the court said (p. 424) that the policy in this state where no innocent parties are involved, is to permit a judgment debtor to redeem upon equitable terms even though the period of redemption has expired, where the provisions of the law have not been complied with and the judgment creditor would otherwise gain a benefit to which he is not entitled. Other cases cited by counsel state the same rule.

There is no ^{credible} evidence in this record that Kidera ever personally agreed to assign this certificate to anyone at anytime. It is not contended that he ever discussed with his attorney or anyone else anything about extending the period of redemption. His only conversation about assigning the certificate was with his attorney and what he told him was that he was not interested in selling or assigning the certificate to any individual or to any nominee of any individual.

we have been advised of the case called and called upon
 v. appellant. In which vs. appellant the bill is reported that
 property worth in excess of \$12,000.00 was purchased at an
 auction sale for \$175.00. The court said that the rule is
 that where there are irregularities, fraud or dishonesty of
 any kind connected with such a sale, a writ of equity may
 issue to set aside the sale and return the money for
 redemption and acquire. The court held that because of the
 issuance of an invalid execution and the gross fraudulence of
 the judgment debtor should be entitled to recover his property.
 In *Ward v. Smith*, 121 Ill. 411 the property involved was
 valued at \$21,430.00 and was subject to a \$1000.00 mortgage. It
 sold for \$1714.30 subject to the mortgage leaving a net credit
 to the purchaser, the court said, of \$17,130.00. In affirming
 the decree of the circuit court which granted the sale of the
 judgment debtor the right to redeem but denied that right
 on the ground, the court said (p. 434) that the policy is to
 state where no innocent parties are involved, it is better a
 judgment debtor to recover upon equitable terms even though the
 period of redemption has expired, where the provisions of the law
 have not been complied with and the judgment creditor would
 otherwise gain a benefit to which he is not entitled. Other
 cases cited by counsel state the same rule.

There is no authority in this country that states that
 personally agreed to assign this certificate to anyone at auction.
 It is not contended that he was assigned to the attorney or
 anyone else anything about extending the period of redemption.
 His only conversation about assigning the certificate was with the
 secretary and what he told him was that he was not interested in
 selling or assigning the certificate to any individual or to any
 business or any individual.

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The testimony in this record falls far short of supporting the allegations and charges made in appellant's second amended petition. The only conclusion to be drawn from all the evidence in this record is that Mrs. Scofield, herself, never desired to redeem from the masters sale nor ever sought any arrangement with Kidera or his attorney extending the period of redemption. She did seek to procure an assignment of the certificate and for that purpose procured a cashier's check for \$20,000.00 and, through Louis Behm, sought to bring about an assignment to him of the certificate of purchase. This cashier's check was left by Behm with Sikes, appellee's attorney. The understanding of Sikes and Behm was reflected in the written instrument signed by Sikes ^{by Behm,} accepted/ That instrument never obligated appellant to assign the certificate to Behm or anyone else. That instrument obligated Sikes to return the cashier's check to Behm if Kidera failed to assign and deliver the certificate of sale to Behm. It also obligated Sikes to turn over the cashier's check to Kidera if he, Kidera, assigned the certificate of sale to Behm.

Sikes testified that shortly after this instrument was executed he communicated with Kidera who declined to execute any assignment and Sikes within five minutes thereafter and prior to five o'clock of the afternoon of July 18, 1960 communicated to Behm, Kidera's decision. According to Behm's testimony Sikes did not tell him of Kidera's refusal until about 9:15 o'clock the following morning.

The conclusion the chancellor arrived at was based upon the credibility of the several witnesses. He observed the parties to this proceeding and he considered their testimony. He concluded that the evidence did not sustain the charges and allegations of the amended petition. We agree, and the judgment order appealed from is affirmed.

McNEAL, P.J. CONCURS.
SMITH, J. CONCURS.

Judgment Order Affirmed.

The testimony in this record falls far short of supporting the allegations and charges made in appellant's second amended petition. The only conclusion to be drawn from all the evidence in this record is that Mrs. Corfield, herself, never desired to recover from the masters sale nor over second any arrangement with Sikes or his attorney extending the period of redemption. She did seek to protect an assignment of the certificate and for that purpose procured a cashier's check for \$50,000.00 and, through Louis Behm, sought to bring about an assignment to him of the certificate of purchase. This cashier's check was lost by him with Sikes, appellee's attorney. The understanding of Sikes and Behm was reflected in the written instrument signed by Sikes and Behm, that instrument never obligated appellant to assign the certificate to Behm or anyone else. That instrument obligated Sikes to return the cashier's check to Behm if Sikes failed to assign and deliver the certificate of sale to Behm. It also obligated Sikes to turn over the cashier's check to Behm if he, Sikes, assigned the certificate of sale to anyone else.

Sikes testified that shortly after this instrument was executed he communicated with Ritter who declined to execute any assignment and Sikes within five minutes thereafter and prior to five o'clock of the afternoon of July 13, 1900 communicated to Behm, Ritter's decision. According to Behm's testimony Sikes did not call him of Ritter's refusal until about 9:15 o'clock the following morning.

The conclusion the majority arrived at was based upon the credibility of the several witnesses. It observed the parties to this proceeding and he considered their testimony. He concluded that the evidence did not sustain the charges and allegations of the second amended petition. He stated, and the judgment order appeared from

is affirmed.
 McKEAL, P. J. CONCURS.
 SMITH, J. CONCURS.
 Judgment Order Affirmed.

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No. 11655

Publish Abstract Only

Agenda 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

OCTOBER TERM, A. D. 1962

FILED

JAN 24 1963

PAUL V. WUNDER
Clerk, Appellate Court Second District

WILLIAM D. GRIFFIN and LAURA)
F. GRIFFIN,)

Plaintiffs-Appellants,)

vs.)

CHARLES H. PENCE and)
ERNESTINE E. PENCE,)

Defendants-Appellees.)

Appeal from the
Circuit Court of
Peoria County.

WRIGHT -- P. J.

The plaintiffs and the defendants are the owners of lots in a subdivision in Peoria County known as Oak Cliff. On one of the plaintiffs' lots is a residence owned and occupied by them. The defendants commenced construction of an eight room apartment house on one of their lots. Plaintiffs instituted a suit for an injunction restraining the defendants from constructing this building in the manner planned on the ground that it would violate certain covenants and restrictions imposed on all lots in the

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information and is not to be used for any other purpose.
The information is being furnished to you for your information
and is not to be used for any other purpose.

subdivision.

Defendants' motion to dismiss the complaint on the ground that it does not state a cause of action was sustained and the trial court entered judgment in favor of the defendants and against the plaintiffs in bar of the action and for costs, from which judgment plaintiffs appeal.

The deed conveying these premises to the defendants was specifically made subject to certain restrictions, the pertinent paragraph of the restrictions being as follows:

"3. No dwelling shall be constructed on any lot at a cost of less than \$30,000.00 based upon cost levels prevailing on January 1, 1959; it being the intention and purpose of this restriction to assure all dwellings shall be of a quality of workmanship and materials substantially the same or better than that which can be produced on said date at the minimum cost stated therein for the minimum permitted dwelling size. The ground floor area of the main structure, exclusive of garages, breezeways and porches shall not be less than 1,600 square feet."

The only allegation in the complaint alleging a violation of any of the restrictions is Paragraph 7 which alleges "that notwithstanding the provisions of said restrictions, the defendants commenced construction of an apartment building on the premises owned by them which is not in compliance with said restrictions, particularly with Paragraph 3 thereof, in that the apartments in said apartment building have an area of less than 1,600 square feet and each apartment

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thereof will have a reasonable cost of less than \$30,000.00."

It has long been the rule in our state that restrictive covenants as to real estate shall be strictly construed and that all doubts are to be resolved in favor of the free use and enjoyment of the property. *Labadie v. Morris*, 303 Ill. 321; *Boylston v. Holmes*, 276 Ill. 279.

The plaintiffs agree and concede in their brief that the defendants under the restrictions are entitled to erect an apartment house but contend that each apartment in the apartment house will constitute a single dwelling, and to satisfy the restrictions set forth in Paragraph 3 must contain not less than 1,600 square feet and cost not less than \$30,000.00.

It is the contention of the defendants that the restrictions require that the ground floor area of the main structure or entire apartment house shall contain not less than 1,600 square feet, and that the main structure shall cost not less than \$30,000.00.

This is a complaint for an injunction and it must appear on the face of the complaint that the plaintiff has a clear right to injunctive relief. *Gates v. Sweitzer*, 347 Ill. 353; *Hope v. Hope*, 350 Ill. App. 190, 112 N. E. 2d 495.

A determination of this case depends upon the interpretation or construction placed on Paragraph 3 of the

1. The first step in the process of the development of a new product is the identification of a market need. This is done by conducting market research, which involves gathering information about the current market and the needs of potential customers. This information is then used to develop a product concept that meets the identified need.

2. The second step is the development of a business plan. This plan outlines the financial aspects of the product, including the costs of production, distribution, and marketing, as well as the expected revenue and profit. It also includes a description of the marketing strategy and the sales channels that will be used to reach the target market.

3. The third step is the development of a prototype. This is a physical model of the product that is used to test the design and to demonstrate the product's functionality to potential customers. The prototype is typically made from a material that is easy to work with, such as wood or plastic, and it is often used to gather feedback from potential customers.

4. The fourth step is the development of a marketing plan. This plan outlines the strategies and tactics that will be used to promote the product and to reach the target market. It includes information about the product's unique selling proposition, the target market, the marketing channels that will be used, and the budget for the marketing campaign.

5. The fifth and final step is the production and distribution of the product. This involves the manufacturing of the product, the distribution of the product to the target market, and the ongoing monitoring of the product's performance in the market. This step is often the most challenging, as it requires a significant investment of time and money, and it involves a high degree of risk.

restrictions heretofore set out in this opinion.

We are not convinced by the argument of plaintiffs that the word dwelling as used in Paragraph 3 of the restrictions means each unit in the apartment house is to be considered a separate dwelling. We believe that the restrictions contained in Paragraph 3 only require that the ground floor area of the main structure or entire apartment building which constitutes a dwelling shall have an area of not less than 1,600 square feet and the entire structure shall have a reasonable cost of not less than \$30,000.00.

The restrictions contained in Paragraph 3 as heretofore set out were not intended to hamper the free use of the lots in the subdivision, but the lots were made subject to these restrictions to prevent the construction of small inexpensive structures that would tend to decrease the value of other lots and dwellings in the subdivision.

If the original grantor had intended that each apartment unit should cost not less than \$30,000.00 and contain not less than 1,600 square feet, it would have been a simple matter to set such requirements out by apt words in the restrictions.

In view of the construction which we place on Paragraph 3 of the restrictions, it follows that Paragraph 7 of the plaintiffs' complaint, which alleges in substance that the

apartment building commenced by the defendant is in violation of the restrictions because each apartment in the structure will have an area of less than 1,600 square feet and that each apartment will have a reasonable cost of less than \$30,000.00, does not state a cause of action. This allegation when taken as admitted does not allege facts that constitute a violation of Paragraph 3 of the restrictive covenants.

The judgment of the Circuit Court of Peoria County is affirmed.

A F F I R M E D.

*L. C. and
concur
Spring, J. concurs*

12-2-20

391A-140

48796

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Defendant in Error,)	WRIT OF ERROR TO
)	
v.)	MUNICIPAL COURT OF
)	
DANIEL RIZZO,)	CHICAGO.
)	
Plaintiff in Error.)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant, Daniel Rizzo, a police officer of the City of Chicago, was charged in an information with unlawfully receiving \$10 for omitting to arrest a traffic violator. In a nonjury trial, defendant was found guilty and a \$100 fine was assessed against him. Defendant appeals.

The information, filed September 26, 1960, charged that " * * * Daniel Rizzo * * * on the 24th day of September A.D. 1960, at the City of Chicago aforesaid did then and there being a police officer of the City of Chicago authorized to serve legal process, and did and there unlawfully receive ten dollars in United States currency from Theodore Samuels for omitting to arrest Theodore Samuels for a violation of a traffic law. In violation of Chapter 38, Par. 81, Illinois Revised Statutes * * *."

The evidence shows that the complaining witness, Theodore Samuels, on the evening of September 24, 1960, while driving his car on a public street in Chicago, was stopped by the defendant, who told Samuels that he had failed to stop at a stop sign, and that such a violation would result in a \$10 fine and the posting

1885

The first of the year was a very cold one, and the weather was very disagreeable. The wind was very strong, and the rain was very heavy. The snow was very deep, and the ice was very thick. The people were very much distressed, and the animals were very much suffering. The crops were very much damaged, and the stock was very much reduced. The people were very much distressed, and the animals were very much suffering. The crops were very much damaged, and the stock was very much reduced.

of a bond. Samuels denied the accusation. Defendant stated he was in financial difficulty and was in need of money. Samuels told defendant that he had no money but did have a traveler's check, which he could cash. They arranged to meet at 10:30 P.M. at Clark and Halsted Streets. Defendant took possession of the driver's license of Samuels and agreed to return it later.

Samuels returned to his hotel and made contact with the police department. Later, the deputy chief of the patrol division of the Chicago police, Bernard Deir, and two police officers, met with Samuels and drove to the vicinity of Clark and Halsted Streets. Deir gave Samuels a \$10 bill and recorded the serial number. Samuels went over to defendant's car, which was parked in the vicinity, got into it, and gave defendant, who was wearing a regular police uniform, the \$10 bill he received from Deir. Defendant returned to Samuels his driver's license, and they separated.

About a half hour later on the same evening, Samuels saw defendant at a police station and identified him out of a line-up of four other policemen. Defendant, after being placed under arrest and when threatened with a search of his person, gave up a \$10 bill, which he took from his shoe. It bore the same serial number as that of the \$10 bill given to Samuels by Deir.

Defendant testified that he had never seen Samuels before. He denied he received the \$10 from anyone for omitting to arrest for a traffic violation, and also denied any possession of the



driver's license of Samuels.

Paragraph 81 (Ch. 38, Ill. Rev. Stat. 1959, which has been superseded by 133-3 of the Criminal Code of 1961) reads as follows:

"If a sheriff, constable, or other officer authorized to serve legal process, receives from a defendant, or from any other person, any money or other valuable thing as a consideration, reward or inducement for omitting or delaying to arrest a defendant, or to carry him before a magistrate, or for delaying to take a person to prison, or for postponing the sale of property under an execution, or for omitting or delaying to perform any duty pertaining to his office, he shall be fined not exceeding \$300, or confined in the county jail not exceeding three months."

Defendant does not contend that the State failed to adduce sufficient evidence to prove the acts set forth in the information, nor does he question the applicability of the statute to police officers on duty. Rather, his sole contention is that the statute requires the State to prove "that he had a warrant for the arrest of Theodore Samuels in his possession, and that he failed to arrest Mr. Samuels pursuant to the mandate of the warrant."

We have examined authorities cited by defendant to support the contention that it is obvious that an officer who is charged with violating paragraph 81 "must have in his possession legal process." We agree that "process" is the means of compelling a defendant to appear in court; that any means of acquiring jurisdiction is properly denominated "process" and includes the serving of summons (Ogdon v. Gianakos, 415 Ill. 591, 596 (1953)); also, that a warrant for arrest is "process." 72 C.J.S. 988.

We have also examined a Michigan statute cited by defendant (Michigan Annotated Statutes, Vol. 24, §28.318), which provides:



"Any sheriff, coroner, constable, peace officer, or any other officer authorized to serve process or arrest or apprehend offenders against criminal law who shall receive from a defendant * * *."

We are not persuaded that these authorities indicate that paragraph 81 should be interpreted to require proof that a police officer, on duty, must be "armed with a warrant for the arrest of a defendant" before the officer can be found guilty of violating the provisions of paragraph 81. We believe the words "or other officer authorized to serve legal process" are intended to limit and define the class to be included in its provisions. This interpretation is supported by the language of the other articles appearing under the heading of "Bribery" in Chapter 38. Any other interpretation would be contrary to the spirit of the statute (Ch. 38, §657), and the many authorities which provide that any officer may arrest without a warrant, as here, "for a criminal offense committed or attempted in his presence, * * *." People v. Edge, 406 Ill. 490 (1950); People v. Fiorito, 19 Ill.2d 246 (1960).

We also conclude that the term "defendant," as used in paragraph 81, is not limited to the class of persons "against whom a civil suit or action has been filed." We believe it was intended to include any criminal offender who was about to be apprehended or arrested.

For the reasons given, the judgment against defendant is affirmed.

AFFIRMED.



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Abstract

General NO. 11622

(Abstract Only)

391A² 148

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(Second Division)

OCTOBER TERM, A. D. 1962

FILED

JAN 1 1963

PAUL V. WUNDER
Clerk Appellate Court Second District

MARIO M. MARINELLI and VANIE F.
MARINELLI,

Plaintiffs-Appellants,

vs.

TRI-BILT CONSTRUCTION, INC., an
Illinois Corporation, PETER T.
TRIOLO, ANGELA R. TRIOLO, JOSEPH
TRIOLO and MARGARET TRIOLO,

Defendants-Appellees.

Appeal from the
Circuit Court of
Winnebago County

SPIVEY J.

The Circuit Court of Winnebago County entered judgment for the defendants named in three counts of a four count complaint. Plaintiffs appeal from this order.

Count I of the amended complaint charges the defendant Tri-Bilt Construction, Inc. with various violations of the terms and covenants of the construction agreement. Count II of the amended complaint asserts an implied contract and charges that following the dissolution of the corporation, the defendants Peter T. Triolo, Angelo Triolo, Joseph Triolo, and Margaret Triolo elected to carry on the business of the corporation and complete the contract as individuals and not for the purpose of winding up the business of the corporation. The same violations of the construction contract are alleged as in Count I. Count III of the amended complaint asserts an implied contract and charges that following

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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the dissolution of the corporation, the defendants Peter T. Triolo and Joseph Triolo elected to carry on the business of the corporation and complete the contract as partners and not for the purpose of winding up the business of the corporation. The same violations of the construction contract are alleged as in Count I. Amended Count IV of the amended complaint charges the defendants Peter T. Triolo and Joseph Triolo as agents of the defendant Tri-Bilt Construction, Inc., negligently constructed the dwelling house. Various acts of negligence were alleged.

On motion of the named defendants in Counts II and III and amended Count IV, the respective counts were struck and judgment entered for the respective defendants. Count I remains pending in the Circuit Court.

The right to appeal from a judgment adjudicating fewer than all of the claims, rights and liabilities of all of the parties is governed by Section 50 (2) of the Civil Practice Act, Chap. 110, Sect. 50 (2) Ill. Rev. Stat. 1961. Bohannon v. Joseph T. Eyerson and Sons, Inc., 15 Ill. 2d. 470, 155 N.E. 2d. 585.

It is mandatory under Section 50 (2) of the Civil Practice Act to obtain from the trial court an express finding in its judgment that there is no just reason for delaying enforcement or appeal. Arcola v. Nigro, 13 Ill. 2d. 200, 148 N.E. 2d. 787; Getzelman v. Koehler, 14 Ill. 2d. 396, 152 N.E. 2d. 833; Cannon v. Thompson, 28 Ill. App. 2d. 69, 70 N.E. 2d. 174.

It would serve no useful purpose to elaborate upon the reason and logic prompting this legislation in that it has been ably discussed in the opinions cited herein.

Plaintiffs having failed to obtain an express finding that there is no just reason for delaying enforcement or appeal we have no alternative but to dismiss this appeal.

Appeal dismissed.

Wright P.J. and Crow J. Concur

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

391A2-180

Agenda No. 8

General No. 10420

Chief Frate, Inc. a corporation)
Plaintiff-Appellant)

vs.)

Wabash Railroad Company, a corp-)
oration)

Defendant-Appellee)

Appeal from the
Circuit Court of
McLean County

CARROLL, J.

This is an action for property damage sustained by plaintiff when its truck collided with defendant's passenger train at a grade crossing. The jury returned a verdict for plaintiff. Following a hearing on a post trial motion, the verdict was set aside and the Court entered judgment in favor of the defendant notwithstanding the verdict and in the alternative conditionally granted a new trial. Plaintiff appeals.

The question presented to the trial court by the defendant's motion for judgment notwithstanding the verdict was whether there was any evidence which, when considered in its aspects most favorable to plaintiff, together with all reasonable inferences to be legitimately drawn therefrom, tended to prove the essential elements of plaintiff's case. In passing upon such motion, the court cannot weigh the evidence or judge the credibility of witnesses, but is concerned only with determining whether plaintiff's evidence as a matter of law fails to support the negligence charges laid in the

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Volume No. 8

Special from the
District Court of
Illinois County

STATE OF ILLINOIS
JUDICIAL CLERK
THIRD DISTRICT

General No. 10/20

Chief Justice, Inc. a corporation

Plaintiff-Appellant

vs.

Wabash Railroad Company, a corporation

Defendant-Appellee

CAUTION, 1.

This is an action for property damage sustained by Plaintiff when its truck collided with defendant's passenger car on a grade crossing. The jury returned a verdict for Plaintiff. Before the hearing on a post trial motion, the verdict was set aside and the Court entered judgment in favor of the defendant notwithstanding the verdict and in the alternative constitutionally granted a new trial. Plaintiff appeals.

The question presented to the trial court by the defendant's motion for judgment notwithstanding the verdict was whether there was any evidence which, when considered in its proper context, was competent to establish Plaintiff's liability. Plaintiff with all reasonable inferences to be factually drawn therefrom, failed to show the essential elements of Plaintiff's case. In passing upon such motion, the court acted within the evidence by finding the inadmissibility of witnesses, and is concerned only with determining whether Plaintiff's evidence as a matter of law fails to support the judgment entered and is not

complaint and the averment of due care on plaintiff's part.

Bernard v. Elgin J. & E. Ry. Co. 34 Ill. App. 2d 466, 181 N.E. 2d 613; Moss v. Wagner 36 Ill. App. 2d 86, 183 N.E. 2d 528; Tabor v. Tazewell Service Co. 18 Ill. App. 2d 593, 153 N.E. 2d 98. If in the instant case the evidence, when subjected to the foregoing test, discloses a total failure to prove one or more of the essential elements of plaintiff's case, then the propriety of the trial court's action in sustaining defendant's motion is not open to question.

The complaint alleges in substance that at the time of the collision plaintiff through its agent, was in the exercise of due care; that defendant was guilty of negligence in failing to operate its train at a speed reasonable and proper under the circumstances; in failing to have an automatic flashing system at the crossing in question, in failing to provide a brakeman or other warning device at said crossing and in failing to cause a bell, whistle or horn to be rung or sounded as required by Sec. 59 Chap. 114, Ill. Rev. Stat., 1959 and that as a proximate result of such negligence on defendant's part, plaintiff sustained severe damage to its truck.

The collision occurred at about 2:15 P. M. on October 6, 1960, which was a clear, dry, sunny day. Plaintiff's tractor-trailer freight truck driven by Howard James was making a delivery in the town of Evington, which is in Livingston County, Illinois. The defendant's railroad tracks run through Evington in a generally

north-south direction. Just prior to the occurrence the truck was being driven East on a dirt and gravel street which crossed defendant's tracks. The driver testified that he was familiar with the Village of Emington and had been there a good many times; that after making a delivery in the business district he turned right at a corner west of the crossing; that he then realized that he had made a mistake in directions and had turned onto the wrong street; that he "was going to pull over the railroad tracks and turn around to go back out of town"; that he knew where he was going; that he drove the truck up to 8 or 10 feet from the track and stopped; that he looked both ways, shifted into low gear, and started across the track; that (Quoting his words) "Before I made my stop I looked both ways and before I got on the approach to the tracks I could not see beyond the depot. When I made my stop I still could not see beyond the depot" "After I stopped and then started across, I was just creeping. When I got out on top, I looked to my right and the train was there. He could have been no further than the depot, about 500 feet. At that point, the rear wheels of my tractor were just about on the main line. I shoved the truck in reverse, stepped on the gas and tried to get off." That in looking to his right or the south, he had to look at an angle, raising his head and looking over his shoulder; that windows on his truck were down and he listened and heard nothing.

ready-made theories. Just prior to the outbreak the road was
being driven past on a dirt and gravel track which crossed the
road's side. The driver noticed that the road was being
the village of Belknap and had been there a good while. Then
after making a delivery in the village (which he never visits
at a corner near of the road) that he then reached that he had
made a mistake in directions and had turned onto the wrong road.
that he "was going to pull over the village house and look around
to see what was going on. He then went to the house and found
the track up to it to find that the house was empty; that he
found both ways, either into the house, and found it empty. He
found that the house was empty. He then went to the house and
both ways and found I got on the opposite to the house I went and
the house was empty. When I made up my mind I still could not see
around the house. . . . I then I stepped and then started walking.
I was just walking. When I got out on top, I looked to my right and
the train was there. He would have been no further than the road.
about 300 feet. He then walked, the road would be in front of him.
Just about on the same line, I showed the train in front, stopped
on the road and tried to get into the house. When he did not go
for water, he had to find me in water. With all this and looking
over his shoulder, that shows to his house with him and the house
and house water.

Defendant's engineer, called as a witness by plaintiff under Sec. 60 of the Civil Practice Act, testified that the crossing can be seen from a mile to the South; that when he first saw the truck it was 2,000 feet away; that he saw it move up and then pull onto the tracks; that the train then went into an emergency stop; that he began blowing the whistle when a mile South of the crossing; that the lights on the diesel were burning and the bell ringing.

The only other witness for plaintiff was Arthur Sterrenberg, who testified that the defendant's main track was approximately 18 inches higher than the approaching road; that at a distance of 20 feet from the track you can see a block or a block and a half down the right of way; that the track crosses the road on a 60 degree angle; that you could probably look straight down the tracks at 20 feet back. Certain photographs showing the physical situation at the crossing were admitted in evidence.

One of the essential elements of plaintiff's case was proof that, acting through its agent, it was exercising due care at the time of the accident. There is perhaps no rule of law more firmly established than that of the duties resting on a traveler at a railroad track. A concise statement thereof appears in Tucker v. N.Y., C. & St. L. R.R. Co. 12 Ill. 2d⁵³²/147 N.E. 2d 376, where it is said:

"It is well settled that railroad crossings are dangerous places, and that in crossing them a person must approach the track with a degree of care proportionate to the known danger. The law requires that the traveler make diligent use of his senses of sight and hearing and exercise care commensurate with the danger to be anticipated. (Moudy v. New York, Chicago & St. Louis

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Railroad Co. 385 Ill. 446, 53 N.E. 2d 406;
Provanzano v. Illinois Central Railroad Co.,
357 Ill. 192, 191 N.E. 287; Greenwald v. Balti-
more & Ohio Railroad Co., 332 Ill. 627, 164
N.E. 142.) Nor does the law tolerate the ab-
surdity of permitting a plaintiff to say he
looked and did not see the approaching train,
when had he looked he would have seen it. (Dee
v. City of Peru, 343 Ill. 36, 174 N.E. 901;
Greenwald v. Baltimore & Ohio Railroad Co., 332
Ill. 627, 164 N.E. 142; Holt v. Illinois Central
Railroad Co., 318 Ill. App. 436, 48 N.E. 2d 446.")

It is only where the proofs show the view of the train to have been obstructed or other circumstances tending to distract or confuse a traveler approaching a crossing or to lull him into a false sense of security that failure to look and listen is excused. Gills v. N.Y.C. and St. L. R.R. Co. 342, Ill. 455 and Tucker v. N.Y.C. and St. L. R.R. Co., supra. Whether in this case plaintiff discharged its duty with respect to exercising due care must be determined not only from the evidence as to what the driver did just prior to and at the time of the collision, but also from the circumstances under which he acted. Here the evidence shows the collision occurred at about 2:15 P. M. on a clear, dry and sunny day. Plaintiff's driver was familiar with the crossing and approached it cautiously. There is no evidence of noise or other factors that might tend to interfere with his hearing or in any manner distract his attention. That he was fully conscious of the existence of the crossing and the dangers it presented is not open to question. He testified that he stopped the truck 8 to 10 feet from the track, looked both ways, and started across. When asked how far to the south from the point of his stopping he could see, he answered, "You can't see beyond the depot." It thus seems to be plaintiff's contention that the depot

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was such an obstruction to its driver's view that it furnished an excuse for his failure to discern the presence of the approaching train. However, the record does not appear to sustain such theory. The evidence shows that after stopping 8 or 10 feet west of the track, the driver moved forward slowly and that when the truck was on the track he looked to the right and saw the train 500 feet sway. Two of the photographs that were taken at points 7 and 20 feet west of the west rail of defendant's tracks show that the driver when at such point would have a clear and unobstructed view of any approaching train when it was as far to the south as the eye can see. In view of these undisputed physical facts, and the complete lack of evidence corroborating the driver's testimony, we think the conclusion is unescapable that if the driver had looked as he claimed he did, he would have seen the train. Significantly he did not testify that the depot blocked his view but merely stated that it marked the limit of his vision to the right. Why he was unable to see beyond the depot is unexplained. There is also an absence of evidence showing that he looked for trains at any point other than where he claims he stopped, shifted gears and proceeded on to the tracks. If he could see further to his right when more than 8 or 10 feet from the crossing, prudence would seem to require him to then begin looking instead of waiting until he was almost on the tracks. Where the record demonstrates that reasonable minds would agree that the evidence and the inferences to be legitimately drawn therefrom fails to

was such an extraordinary case in the history of the world, and
because for his father he received the amount of the compensation
therein. However, the court was not aware of the fact that the
The witness stated that after receiving the sum of \$10,000 in 1911
from, the witness never received anything more from the same source
on the books he looked up the rights and saw that the same was
one of the photographs that were taken of the witness in 1911 and
of the same date as the photograph of the witness taken in 1911
which points were a close and accurate copy of the photograph
the truth when it was in the hands of the witness, the
view of these matters, the witness stated, and the complete lack of
and corroborating the witness testimony, and that the witness
is convinced that in the witness's mind he is certain that
he would have seen the same photograph in the witness's hands
the same witness did not see the photograph until it was in the
hands of the witness in the year 1911. He was certain of the
the report is corroborated. There is also no doubt of the
statement that he received the same photograph from the witness
which he received, which was the photograph of the witness.
It is well known and known to his right mind that he did not
the witness, because would have been in the witness's hands
least of which would be the same as the witness, there was
several instances that the witness's mind would agree that the witness
and the witnesses in the photograph were the same as the

establish due care on the plaintiff's part, then the issue of contributory negligence becomes a question of law for the Court. Devore v. Toledo, Peoria & W. Railroad, 30 Ill. App. 2d 409, 174 N.E. 2d 883; Overman v. Illinois Cent. R.R. Co., 34 Ill. App. 2d 30, 180 N.E. 2d 213; Tucker, supra.

In this case we are convinced there was a total failure to prove due care on the part of plaintiff. Accordingly the trial court did not err in entering judgment for the defendant notwithstanding the verdict.

Affirmed.

REYNOLDS, P.J. and
ROETH, J., concur.

contributory negligence becomes a question of law for the Court.

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30, 180 N. W. 1/4, Sec. 31, T. 20 N., R. 10 E., S. 10 E.

It is this case to the conviction that the total failure to prove the case on the part of the State is the total failure to prove the case on the part of the State.

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PEOPLE OF THE STATE OF
ILLINOIS,

v.

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT OF
CHICAGO, ILLINOIS

Defendant asks this court to reverse a judgment of the Municipal Court of Chicago, entered after a bench trial, finding defendant guilty of driving while under the influence of alcohol. He was sentenced to serve three days in the House of Correction.

The arrest of defendant took place on March 9, 1962, at 9:30 p.m., when he was stopped by a police officer for speeding, and was charged with driving 45 miles per hour in a 30-mile zone. The officer testified that then, and after he had taken defendant to the police station, he detected the odor of alcohol on defendant's breath; that defendant walked in a swaying manner; that his speech was slurred; that his clothes were soiled; and that, after his arrest, defendant's attitude was insulting. The officer also testified that defendant was under the influence of alcohol; that his opinion in this regard was based on the facts outlined above, and on his observation of defendant not only at the place of arrest but also for approximately ten minutes at the police station; and all in the light of his nine years' experience as a Chicago police officer, during which time he had made more than 500 arrests of individuals for driving under the influence of alcohol.

Defendant testified that he had worked for more than twelve hours that day, commencing at 8:00 a.m., and had helped in the moving of fifteen pianos; that he was not traveling faster than 25 miles per hour; that he was tired but was not intoxicated, and had had nothing to drink that day.

On cross-examination defendant first admitted that he drank one beer with lunch, and then admitted that he drank two.

In the car with defendant at the time of his arrest were three other men and Peggy Imberger. The latter testified that she had known defendant for six years and that he was taking her home at the time; that defendant looked the same on that occasion as he did in court, and that he did not have anything to drink on the day of the trial; that she had not smelled any liquor on his breath.

Relying on People v. Miller, 23 Ill. App. 2d 352, defendant contends that the proof was insufficient to establish the charge beyond a reasonable doubt. We do not agree. The police officer's testimony taken by itself was sufficient to prove guilt beyond a reasonable doubt, and the only basis, therefore, for defendant's contention is that a doubt was raised by the testimony of the defendant and his friend. This simply presents the question of the credibility of the witnesses' testimony and, as stated very recently in People v. Cool, 26 Ill. 2d 255, at page 258: "Where the guilt or innocence of the defendant depends upon the credibility of conflicting testimony, the finding of the trial court will not be disturbed." See, also, People v. Martin, 303 Ill. 233, 238.



The facts in People v. Miller, 23 Ill. App. 2d 352, are clearly distinguishable,* and we do not find anything in that opinion which would require us to reach a different result.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

BURMAN, P.J., and MURPHY, J., concur.

Not to be published in full.

* In the Miller case, there was uncontradicted and corroborated testimony of the defendant that he had consumed a double shot of whiskey in the half hour after the accident involving his automobile and before the arrival of the police officer. In fact, when the officer, who was the sole witness for the State, first arrived at the scene after the accident, he saw defendant coming out of a tavern.



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PEOPLE OF THE STATE OF ILLINOIS,)	
VILLAGE OF BRIDGEVIEW, ILLINOIS,)	
)	APPEAL FROM
Appellant,)	
)	CRIMINAL COURT,
v.)	
)	COOK COUNTY.
EVELYN TALERICO,)	
)	
Appellee.)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In an appeal to the Criminal Court of Cook County, where the matter was tried de novo, defendant, Evelyn Talerico, was found not guilty of violating an ordinance of the Village of Bridgeview, by selling intoxicating liquor without a license. The Village appeals.

The facts are not disputed. Defendant has operated a tavern in Bridgeview since 1950. The local ordinance (57-19 §5) provides that retail liquor licenses "shall be issued for a period of one year, commencing on the first day of May and ending on the 30th day of the following April." The record indicates that the Village has been dilatory in processing renewal applications. In 1959, the village clerk mailed a license renewal application to defendant on June 4th, and defendant completed the application and returned it with the fee due on the same date; the Village did not deposit the check for the fee until December 3, 1959, and did not issue the license (for the period May 1, 1959-April 30, 1960) until December 8, 1959.

-2-

Defendant transacted business uninterruptedly during the whole of that license year.

The 1959-1960 license expired on April 30, 1960. On July 7, 1960, a village police officer visited defendant's tavern and inquired about the current license. On the next day, July 8, 1960, defendant filled out a renewal application for the license year 1960-1961 and delivered it to the village clerk's office. The application was accepted, but defendant's check for the annual fee was refused.

On July 11, 1960, village police officers again visited defendant's tavern. They asked to see the current license, and defendant stated that she had applied for one but had not yet received it. An officer thereupon issued a ticket for violation of the Bridgeview ordinance, and defendant posted bond.

On August 15, 1960, the local liquor commissioner (the village president) held a hearing concerning renewal of defendant's license, and the arresting officer testified. On August 25, 1960, the commissioner entered an order denying defendant's application for renewal. Pursuant to statute (Ill. Rev. Stat., Chap. 43, §153), defendant appealed this denial to the Illinois Liquor Control Commission, where the matter was tried de novo as provided by the statute. On December 6, 1960, the Illinois Liquor

Control Commission entered an order reversing the denial of defendant's renewal application, and directing that the local commissioner "issue the Local Retail Liquor License for the year 1960, as applied for by said appellant." Without seeking administrative review of this order, the Village on January 10, 1961, issued to defendant a license, in evidence, for the period May 1, 1960, to April 30, 1961, and collected from defendant the annual fee of \$600.00.

On May 20, 1961, in a jury trial before a justice of the peace, defendant was found guilty of selling liquor without a license on July 11, 1960, and was fined \$5.00. Defendant then appealed to the Criminal Court of Cook County and was found not guilty in a nonjury trial de novo. It is from this judgment the Village appeals.

The Village contends that the only issue is whether, on July 11, 1960, defendant had a license to sell liquor at retail. Therefore, the only question we need consider is whether the license issued on January 10, 1961--in terms applicable to the whole period from May 1, 1960, to April 30, 1961--is a good defense to prosecution for the July 11, 1960, violation. We believe it is.

The Village does not contend that it was compelled to issue a license to defendant for the full year, including the date on which the violation occurred, nor does it contend that it was compelled to collect from defendant the

-4-

license fee for the full year--\$600.00. The Bridgeview ordinance (No. 57-19) explicitly provides for issuance of a local license for a period of less than a year: "Section 5. LICENSE PERIOD--PRO-RATING. * * * The fee to be paid shall be reduced in proportion to the full calendar months which have been [sic] expired in the year, prior to the issuance of the license."

Since the annual fee for a Class "D" license is \$600.00 according to the Bridgeview ordinance (§6(2)), and since the fee collected from defendant for issuance of a Class "D" license was \$600.00, we conclude that the Village did, in fact, license defendant for the entire period from May 1, 1960, to April 30, 1961. Under these circumstances, we hold that the license, though actually issued in January, 1961, related back to May 1, 1960. The license was an official document of the Village and, as such, it could not be contradicted by parol evidence. (Trust Co. of Chicago v. Village of Lincolnwood, 385 Ill. 236, 239 (1944).) Therefore, the Criminal Court was correct in finding defendant not guilty of selling intoxicating liquor without a license on July 11, 1960.

The fact that the Illinois Liquor Control Commission directed issuance of a local license "for the year 1960, as applied for [by defendant]" does not change our conclusion. The Commission order was a final administrative decision,



-5-

binding on the Village unless it sought a review of the order under the provisions of the Administrative Review Act (Ill. Rev. Stat. 1959, Ch. 110, §§264-279).

For the reasons given, the judgment is affirmed.

AFFIRMED.

BURMAN, P.J., and ENGLISH, J., concur.

Abstract only.



Adv-V 3973

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NO. 11668

PUBL. in Full

Agenda 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1962

FILED

FEB 1 1963

NORTHEROOK SUPPLY CO., a
corporation,

Plaintiff-Appellant,

vs.

THUMM CONSTRUCTION CO., etc., ET AL,

Defendants-Appellees,

Consolidated with
CITY OF HIGHLAND PARK, etc., ET AL,
Plaintiff-Appellant,

vs.

THUMM CONSTRUCTION CO., ET AL,
Defendants-Appellees.

PAUL V. WUNDER
Clerk Appellate Court Second District

Appeal from the
Circuit Court,
Lake County.

McNEAL, P. J. -

This case involves a suit filed by Northbrook Supply Co., a corporation, against Thumm Construction Co., a corporation, and the City of Highland Park to enforce a lien against public funds under Section 23, Chapter 82, Illinois Revised Statutes, and also a suit brought by the city for the use of the Northbrook Company against W. J. Lewis Construction Co., a corporation, and General Insurance Company to recover on a contractor's bond under Sections 15 and 16, Chapter 29, Illinois Revised Statutes. The two suits were consolidated for trial.

The evidence shows that Highland Park entered into a contract with the Thumm Company as general contractor to construct sanitary sewers. Thumm furnished a performance bond with General Insurance as surety and sublet a portion of the work to the Lewis Company. Lewis, in turn, purchased over \$10,000 worth of sewer pipe from the plaintiff Northbrook Company. Northbrook was advised that the general contractor Thumm was ready to pay out. Northbrook's vice president then prepared a lien

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NO. 11201

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, EAST DIVISION
PEORIA, ILL., 1921

RECEIVED

MAINTENANCE FUNDING CO.,
INCORPORATED

Plaintiff-Appellant

v.

TRUST CONSTRUCTION CO., INC.

Defendant-Appellee

COMPLAINT AND
CITY OF PEORIA, ILL., 1921
PEORIA, ILL.

TRUST CONSTRUCTION CO., INC.
Defendant-Appellee

MAINTENANCE FUNDING CO.,
INCORPORATED

Plaintiff-Appellee

vs.

TRUST CONSTRUCTION CO., INC.

Defendant-Appellant

MAINT. F. 11201

This case involves a sale made by Maintenance Funding Co.,

a corporation, against Trust Construction Co., a corporation, and the
City of Peoria, Ill., to enforce a lien against public funds under
Section 25, Chapter 92, Illinois Revised Statutes, and also a writ
of mandamus to the city for the use of the public funds, against
Trust Construction Co., a corporation, and the City of Peoria, Ill.,
company to recover on a contract to build a sewer pipe and to
Chapter 92, Illinois Revised Statutes. The city is a corporation.

The evidence shows that Maintenance Funding Co. is a corporation
and the Trust Company is a general contractor or engineer building
sewers. Maintenance Funding Co. has a contract with the city to
build a portion of the sewer to the Trust Company. The city
purchased over 100,000 feet of sewer pipe from the Trust Company
Company. Maintenance was advised that the general contractor, Trust
Company, was not to pay any. Maintenance's vice president then advised a

waiver and a trust receipt. William Lewis of the Lewis Construction Company executed the trust receipt, and the lien waiver was delivered to him so that the Lewis Company could obtain payment from Thumm. The trust receipt provided that Lewis was to collect from Thumm and turn over to Northbrook the sum of \$10,400.95 within twenty-four hours and that failure to do so was to constitute a wrongful conversion. Northbrook's vice president testified that he prepared and delivered the lien waiver so that Lewis could obtain payment from Thumm, that he knew that Northbrook had a lien only upon the funds and not upon the property, that he intended to waive all lien rights under the statutes of Illinois, and that he was relying upon the trust receipt. The exact wording of the waiver is as follows:

"Waiver of Lien
Materials or Labor

Geo. E. Cole & Co. Chicago
Legal Blanks

STATE OF ILLINOIS

COOK COUNTY

} SS

December 16, 1959

TO ALL WHOM IT MAY CONCERN:

WHEREAS, We, the undersigned NORTHBROOK SUPPLY CO. has been employed by W. J. Lewis Construction Co. to furnish Sewer Pipe for the building known as County Line Road Sewer Job, Highland Park, Illinois.

NOW, THEREFORE, KNOW YE, that we the undersigned, for and in consideration of Ten thousand Four hundred & 95/100 Dollars, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien, or claim, or right of lien on said above described building and premises under the Statutes of the State of Illinois relating to Mechanics' Liens, on account of labor or materials, or both, furnished or which may be furnished by the undersigned to or on account of the said W. J. Lewis Construction Co. for said building or premises.

GIVEN under our hand and seal this 16th day of December, 1959.

NORTHBROOK SUPPLY CO. (Corporate
/s/ DON CUNNINGHAM Seal)
V.P. & Treas."

Lewis delivered this lien waiver to Thumm together with other waivers and received payment of \$12,161.20 from Thumm, but failed to pay Northbrook. Northbrook then instituted the present actions, which were

that he was relying upon the first receipt. The first receipt of the Northbrook had a list only upon the funds and was upon the property of the receiver so that Lewis could obtain payment from them. That he knew that Brock's first payment was the first that he prepared and delivered to the receiver is not in dispute. It is not in dispute that Lewis was aware that invoice to be so as to constitute a receipt for the property. Lewis never to Northbrook the sum of \$10,400.00 within a reasonable time and the first receipt provided that Lewis was to collect that sum and deliver to him so that the Northbrook could obtain payment from them. The Company executed the first receipt, and the first receipt was delivered to Lewis and a first receipt. William Lewis of the Lewis Corporation driver and a first receipt.

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1. The first group of people who were involved in the project were the members of the project team. They were responsible for the overall management of the project and for ensuring that the project was completed on time and within budget. They also had the responsibility of ensuring that the project was completed to the satisfaction of the client.

consolidated. After hearing the evidence, the circuit court entered a decree dismissing the actions for want of equity and entering judgment for the defendants. This appeal followed, the sole question being whether plaintiff is barred by the above waiver.

The difficulty in this case arises from the fact that the statute gives a lien on funds, whereas the lien waiver refers to property. Appellants rely upon Douglas Lumber Co. v. Chicago Home for Incurables, 380 Ill. 87, 100, ^{43 NE 2d 535} wherein the Supreme Court held that a waiver of lien on real estate could not be construed to waive a lien on funds. In the Douglas case the materialman had a lien on both the real estate and the funds, so that it was reasonable to conclude that a waiver of one lien would not release the other. In the case at bar, however, there was only a single lien, namely, on the funds. In this case, if the waiver has any meaning at all, it must be construed to be a waiver of the lien on the funds; and the record conclusively demonstrates that such was the intention of the parties.

While no Illinois decision has been cited which is precisely in point, several decisions have been cited from other jurisdictions which appear to be persuasive. In Kansas City Marble & Tile Co. v. Penker Const. Co., 86 F. 2d 287, 288, a materialman delivered a lien waiver to a subcontractor so that the subcontractor could obtain payment from the general contractor. The waiver purported to release "any and all liens, claims and right to lien for any and all work, labor and material by themselves furnished or which may be furnished in and about said premises." The contractor paid out in reliance on this lien waiver. In an action brought by the materialman the District Court held that the materialman was estopped. In affirming the District Court, the Fourth Circuit Court of Appeals said:

"As there could be no lien upon the public building, we think it clear that the word 'claims' in the waiver should be construed as having reference to claims under the bond for materials furnished, and should not be limited to claims to a lien which could have no existence under the law. And we agree with the judge below that petitioner is estopped from

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OF THE COURT OF APPEALS

The first of these is the fact that the defendant is a person of good character and high standing in the community. The second is the fact that the defendant is a person of good character and high standing in the community. The third is the fact that the defendant is a person of good character and high standing in the community.

(Cal. app.)

asserting a claim against the bond for the materials furnished, since it is clear that petitioner intended by the execution of the waiver to assure the general contractor that petitioner would assert no claim against him for materials furnished and that the general contractor was thereby induced to make settlement with the subcontractor. All parties understood that payments would not be made to the subcontractor so long as claims for materials furnished him might be asserted against the bond; and the waiver was executed by petitioner to be used by the subcontractor for obtaining such payments. Having thus aided the subcontractor to obtain the payments, petitioner ought not to be heard to say that the waiver contemplated non-existent liens rather than claims against the bond which had been provided in lieu of lien for the protection of laborers and materialmen."

In Reinhart Lumber & Planing Mill Co. v. Hladik, 259 P 363, certain plaintiffs released any lien which they might have for "concrete work and inside plastering." They later sought to evade the effect of their release on the ground that they did not actually do any "concrete work" or "inside plastering." This contention was rejected, the court stating that such a construction would make the execution of the waivers a "mere idle act" and render them of "no force and effect."

[1] What constitutes a waiver of lien is essentially a question of intention. 57 C.J.S. 794, Mechanics' Liens, Par. 223; Love, Illinois Mechanics' Liens, 2nd ed., Par. 175, p. 457; Paulsen v. Manske, 126 Ill 72, 80; Dymond v. Bruhns, 101 Ill. App. 425, 429, partly affirmed and partly reversed on other grounds in 200 Ill. 292, 65 NE 641/2

[2] In this case it is undisputed that the waiver was intended as a release of any and all liens which Northbrook might have. We believe that the intention of the parties should be given effect. Further, the waiver was given for the express purpose of inducing payment by the general contractor. The general contractor made payment pursuant to the waiver, and we do not believe that Northbrook should be permitted to avoid the consequences of its own conduct.

For the foregoing reasons it is our conclusion that the judgment entered by the Circuit Court of Lake County was correct and said judgment should be and it hereby is affirmed.

J Judgment Affirmed.

DOVE, J. and SMITH, J. Concur

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem and then determine the scope of the study. The next step is to design the study. This involves determining the methods to be used and the data to be collected. The third step is to collect the data. This is done by the investigator who is responsible for the study. The fourth step is to analyze the data. This involves determining the results of the study and the conclusions that can be drawn from the data. The final step is to report the results of the study. This is done by the investigator who is responsible for the study.

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Abstract

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Gen. No. 11634

Agenda 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A.D. 1962.

FILED

FEB 19 1963

PAUL V. WUNDER
Clerk Appellate Court Second District

JAMES B. CLOW & SONS, INC., and
GRETA MATERIAL SALES CO.,
Plaintiffs-Appellants,

vs.

CHESTERFIELD SEWER & WATER, INC.,
a corporation and INLAND INVESTMENT
CORPORATION, et al.,
Defendants-Appellees.

Appeal from
Circuit Court of
Du Page County.

CROW, J.

This is an appeal by the plaintiff James B. Clow and Sons, Inc. and the cross-defendant and counterclaimant Gretna Material Sales Co. from an order dismissing for want of equity the complaint of James B. Clow & Sons, Inc. and the counterclaim of Gretna Material Sales Co., and finding neither claimant had a valid mechanic's lien, on a motion for summary judgment filed by the defendants and counter-claimants, the owners, Inland Investment Corporation and Richard H. Bamford and Mary E. Bamford, in a mechanic's lien foreclosure suit. This motion and the counter-motions addressed thereto of Clow and Gretna were supported by affidavits, exhibits, pleadings, and all papers filed in the case. The Trial Court, taking all of these into consideration, granted the defendants' motion for summary judgment, found the plaintiff and Gretna had no valid lien or interest in the premises, and further found that there were no genuine issues as to any material matters of fact, so far as the order is relevant to this appeal. The original

defendants to the plaintiff's complaint included Chesterfield Water and Sewer, Inc., the contractor, to whom Clow and Gretna furnished materials, etc., and Lynwood Development Corporation and Inland Investment Corporation which allegedly had interests in the real estate, as owners, etc., on which the improvements concerned were allegedly made.

It is alleged in the Complaint of the plaintiff Clow etc. that it is a subcontractor who furnished materials to one of the defendants, Chesterfield Water and Sewer, Inc.; that Lynwood Development Corporation was the owner of certain real estate on May 20, 1959, which real estate was described by metes and bounds as well as lots; that on or before that date Lynwood Development Corporation had a contract with Chesterfield Water and Sewer, Inc. for the furnishing by Chesterfield etc. of certain work, labor and materials, including the installation of certain cast iron water main pipes, fittings, valves and accessories; that Chesterfield ordered from Clow certain cast iron water main pipes, fittings, valves and accessories, and delivery to the premises was completed on September 3, 1959, for which there became due to Clow \$27,849.30; that the materials so furnished were used on and became part of the premises described and became a permanent part thereof and enhanced the value of the premises to an amount in excess of the claim of the plaintiff; that Clow filed notice of lien on November 2, 1959, and filed a subcontractor's claim for lien in the office of the Recorder; that it was due a balance of \$26,738.08 and interest; that Inland Investment Corporation, a defendant, had or claimed an interest in the premises either as owner or mortgagee and that it had knowledge of the furnishing of the materials by the plaintiff; that Inland's interest was subject and subordinate to Clow's interest.

Government of the Republic of the Philippines

Minister of the Interior, Manila

Respected Sir, I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the application for the registration of the Philippine National Bank, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Your obedient servant,

Very truly yours,
Minister of the Interior

Enclosed for the Philippine National Bank are the following documents:

1. Certificate of Incorporation of the Philippine National Bank, dated and filed in the office of the Secretary of the Interior, Manila, on the 10th inst.

2. Certificate of Incorporation of the Philippine National Bank, dated and filed in the office of the Secretary of the Interior, Manila, on the 10th inst.

3. Certificate of Incorporation of the Philippine National Bank, dated and filed in the office of the Secretary of the Interior, Manila, on the 10th inst.

4. Certificate of Incorporation of the Philippine National Bank, dated and filed in the office of the Secretary of the Interior, Manila, on the 10th inst.

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8. Certificate of Incorporation of the Philippine National Bank, dated and filed in the office of the Secretary of the Interior, Manila, on the 10th inst.

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Inland Investment Corporation, a defendant, filed an answer denying that Lynwood etc. was the owner on May 20, 1959 of the real estate, and alleged that prior to May 20, 1959 Lynwood had executed and recorded a plat of subdivision and that by virtue thereof all the portions of real estate described on the plat as roads, drives, trails, or lanes were dedicated to the public for use as public highways and were no longer owned by Lynwood, and further alleged that on May 20, 1959 Lynwood had conveyed by warranty deed to Inland all the lots in Arrowhead Subdivision, the subdivision previously platted and recorded by Lynwood, which deed was recorded May 22, 1959, and Inland alleged that it was now the owner of such lots except those subsequently conveyed to other persons. The Answer of Inland further denied that on or before May 20, 1959, Lynwood had entered into a contract with Chesterfield for the furnishing of work and materials, and said it had no knowledge as to the ordering by Chesterfield of material to be furnished by the plaintiff; denied the ordering of such work or materials on May 20, 1959, and alleged it had no knowledge of delivery of such materials nor of the amount, if any, owing to the plaintiff; denied that the material, if any, furnished by the plaintiff was used upon or became part of the premises owned by the defendant, and denied they are a permanent or valuable improvement thereto or enhanced the value of the premises; alleged no knowledge of the service of a contractor's notice or claim for lien; denied such notice, if served, was timely, legally sufficient, or that there thereupon became due Clow any amount; it alleged it was the owner and denied any notice of claim for lien was served on it; denied knowledge of the filing of a claim for lien, any payment on account, or the amount alleged to be owed Clow; and denied the plaintiff was entitled to a mechanic's lien.

1. The first question is whether the defendant is a "person" within the meaning of the statute. The court has held that a corporation is a "person" for purposes of the statute. 2. The second question is whether the defendant is a "dealer" within the meaning of the statute. The court has held that a corporation is a "dealer" for purposes of the statute. 3. The third question is whether the defendant is a "seller" within the meaning of the statute. The court has held that a corporation is a "seller" for purposes of the statute. 4. The fourth question is whether the defendant is a "buyer" within the meaning of the statute. The court has held that a corporation is a "buyer" for purposes of the statute. 5. The fifth question is whether the defendant is a "lessor" within the meaning of the statute. The court has held that a corporation is a "lessor" for purposes of the statute. 6. The sixth question is whether the defendant is a "lessee" within the meaning of the statute. The court has held that a corporation is a "lessee" for purposes of the statute. 7. The seventh question is whether the defendant is a "mortgagee" within the meaning of the statute. The court has held that a corporation is a "mortgagee" for purposes of the statute. 8. The eighth question is whether the defendant is a "mortgagee" within the meaning of the statute. The court has held that a corporation is a "mortgagee" for purposes of the statute. 9. The ninth question is whether the defendant is a "mortgagee" within the meaning of the statute. The court has held that a corporation is a "mortgagee" for purposes of the statute. 10. The tenth question is whether the defendant is a "mortgagee" within the meaning of the statute. The court has held that a corporation is a "mortgagee" for purposes of the statute.

Inland subsequently filed a counterclaim against Lynwood Development Corporation, James B. Clow & Sons, Inc., Gretna Material Sales Company and other parties, alleging that, inter alia, on or about May 20, 1959, Lynwood, about to become the owner of certain real estate, conveyed it by warranty deed to Inland, the deed being recorded May 22, 1959, and by such Inland became the owner; parts were later conveyed to others, but Inland remained the owner of a part of the premises, which was a part of the real estate described in the Clow complaint and was vacant; certain of such counter or cross-defendants had asserted mechanic's liens upon the public streets, roads and ways and upon the water mains, sewer pipes and other improvements and appurtenances installed or alleged to be installed upon or under the public ways; that the statutes gave no lien upon such public property; and the Inland counterclaim asked the Court to determine that none of the cross-defendants have any interest in or lien upon the premises, nor upon the public streets, roads, or ways or upon any improvements in such public portions of the subdivision, and it asked that the cross-defendants be restrained from asserting any claim to the premises and that the title of the defendant and counterplaintiff Inland be declared and quieted and confirmed.

The plaintiff Clow filed a motion to strike the Inland counterclaim, which was denied, and it then filed an Answer thereto alleging, inter alia, that the deed by Lynwood to Inland was as security for funds advanced; admitted the allegation as to Clow's claim, but denied the materials furnished were only for improvements of streets, roads, and ways, and alleged they were furnished to permit construction of a water main to the lots in the subdivision and the water main constituted a valuable improvement to the lots; the plat recorded April 1, 1959 contained a certifica-

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Bill. It is therefore not possible to say whether or not the amendments are necessary or desirable.

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10. The tenth of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Bill. It is therefore not possible to say whether or not the amendments are necessary or desirable.

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tion by Lynwood dated March 4, 1959 that it was then the owner of the real estate, but on those dates Lynwood was not the owner, and the recording of the plat did not act as a statutory dedication of the streets but was, in effect, a common law dedication with title in the adjoining lot owners to the center of the purported streets subject only to an easement in the public for use; and that it has a valid and enforceable mechanic's lien which is prior to the claim of the defendant counter-plaintiff Inland.

Gretna Material Sales, Co., a counterdefendant, filed an answer to the Inland counterclaim, alleging no knowledge of the allegations, except it denied it had no lien against the premises and affirmatively stated it had a lien for materials furnished. Gretna also filed its own counterclaim to foreclose its own alleged mechanic's lien, making defendants all parties alleging an interest or claim, alleging that on or about February 1, 1959, Lynwood was the owner of the real estate involved, that on that date Lynwood entered into a contract with Chesterfield, whereunder Chesterfield was to install sewer and water in the premises, that on or about the same date Chesterfield made a contract with Gretna whereby Gretna sold to Chesterfield and it purchased pipe and other materials for which Chesterfield agreed to pay Gretna the fair market price prevailing at the time, that, upon order of Chesterfield, Gretna delivered at the premises, pipe and other materials in the amount of \$20,344.10, beginning August 1, 1959 and ending February 1, 1960; all the material became a permanent part of the building and enhanced the value in excess of \$20,344.10; and after credits there is due it \$9539.65; it alleged the conveyance by Lynwood to Inland May 20, 1959 was not absolute but to secure a debt; and service was alleged of a notice of claim on Inland and Lynwood and recording of a claim.

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Inland filed an answer to this Gretna counterclaim, denying Lynwood was the owner of the real estate February 1, 1959, that Lynwood had a contract with Chesterfield, that Chesterfield had a contract with Gretna, denying the delivery and value of any materials, or that such became a permanent part of any building, or enhanced the value thereof or of the premises, and denied any amount due Gretna; it admitted the deed of May 20, 1959 and denied it was not absolute; it admitted service of a claim for lien but denied it was sufficient; denied any recording of a claim for lien and denied that it was a valid, sufficient, timely, truthful, or a proper notice of claim; denied that the pipe or material, if any, was installed on the premises owned by Inland, and stated that such pipe and material, if any, were installed only upon and under the surface of public streets, roads, or other public ways in the subdivision, and denied Gretna was entitled to any relief against it.

Chesterfield Water and Sewer, Inc. filed an answer to the Gretna counterclaim which, so far as now of possible significance, admitted Lynwood's ownership of the property, admitted the Chesterfield-Gretna contract, and admitted the conveyance from Lynwood to Inland.

Inland's motion for summary judgment and decree prayed a decree quieting title in it except for public streets, roads, and ways, and except for a lot owned by the Banfords, and finding the claims of all other parties invalid. As to Clow and Gretna the grounds for the motion were that any materials and labor furnished by them were furnished only upon or under public roads, streets, and ways in the subdivision and not upon any individual lots. In support thereof was an affidavit of Joel F. Rosenthal, President of Inland, that on May 20, 1959 Lynwood conveyed by warranty deed

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the Government of the United States.

THESE ARE THE ONLY TWO CASES IN WHICH THE COURT HAS DECIDED THAT A PERSON MAY BE HELD LIABLE FOR THE ACTS OF HIS AGENTS OR EMPLOYEES. IN ALL OTHER CASES, THE COURT HAS DECIDED THAT A PERSON IS NOT LIABLE FOR THE ACTS OF HIS AGENTS OR EMPLOYEES. IN ALL OTHER CASES, THE COURT HAS DECIDED THAT A PERSON IS NOT LIABLE FOR THE ACTS OF HIS AGENTS OR EMPLOYEES.

to Inland all the real estate described in the Inland counterclaim, a copy of the deed being appended as an exhibit, and Inland was at the time of the counterclaim the owner thereof except the lot conveyed by it later to the Bamfords. Also in support thereof was an affidavit of Steven W. Fitzsimmons, Secretary of Lynwood, that on November 3, 1958 Lynwood contracted to buy certain of the real estate from Wheaton National Bank, as Trustee, a copy of the contract being appended, that on April 23, 1959 a trustee's deed for that real estate was delivered to Lynwood, a copy of that deed being appended, that on September 18, 1958 Lynwood contracted to buy certain of the real estate from Duke S. Durfee et al., a copy of the contract being appended, that on May 18, 1959 the Durfee's warranty deed for that real estate was delivered to Lynwood, a copy of that deed being appended, that the foregoing two deeds of April 23, 1959 and May 18, 1959 included all real estate comprising Arrowhead Subdivision as shown on the plat recorded April 1, 1959; that on or about May 16, 1959 Lynwood entered into a contract with Chesterfield for the installation of sewer pipes and water mains in the public streets, roads, drives and other public portions of the subdivision; that he observed the furnishing and installation of water mains and sewer pipes by Chesterfield and knew of his own knowledge and observation that all of the mains and sewer pipes furnished and installed by Chesterfield in any part of the subdivision and all other materials and labor furnished by it and its subcontractors and materialmen were installed solely in the public streets, roads, drives and other public portions of the Arrowhead Subdivision and no part of the labor and material was at any time physically installed upon any of the individual lots.

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The plaintiff Clow filed a motion that the Inland motion for summary judgment be denied, that there is a question of fact undetermined as to whether the deed from Lynwood to Inland was as security for moneys advanced, that it is impossible to determine under which section of the Practice Act and Rules Inland's motion proceeds, that there is a question of fact undetermined as to whether the improvement for which Clow's material was used was connected with an improvement on the lots. In support thereof is an affidavit of D. H. Nelson, Vice President of Clow, that the plat of Arrowhead Subdivision covering the real estate involved in the proceedings was recorded on April 1, 1959, and that it bears a certificate of the DuPage County Health Department that water facilities are to be furnished by the Arrowhead Water Company, that to comply with the requirements of the certificate it was necessary to construct water mains to supply water to the individual lots in said subdivision, that Chesterfield ordered from the plaintiff Clow cast iron water main pipes, fittings, valves and accessories to be used in the construction of the water mains to supply water to the various lots in the subdivision, that the plaintiff Clow furnished to Chesterfield cast iron water main pipe, fittings, valves and accessories which were used to complete the construction of the water mains in order to make available to individual lots water to be supplied from the pumping station of Arrowhead Water Company, that the materials furnished were and will continue to be used to furnish water to the lots, that a water system enhances the value of every lot serviced whether improved or unimproved, and whether tied into the system or available for tie at a future date, that the lots cannot be used without the use of the water mains which have been installed, that for this purpose they must connect to the water mains, that homes have been constructed on a number

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of the lots and have been and are now being used for residential purposes, and that the materials furnished by the plaintiff Clow are an improvement to all of the lots in the subdivision, that at the time the plat was executed and recorded Lynwood, which signed the plat and certified ownership, was not the owner of record, the plat was recorded April 1, 1959, title to a portion of the real estate was not deeded to Lynwood until April 23, 1959, and title to another portion was not deeded to Lynwood until May 19, 1959. Also in support of the Clow motion and in opposition to the defendants' motion for summary judgment is the affidavit of George J. Fox, an attorney for the plaintiff that at a pretrial deposition of Steven W. Fitzsimmons, of Lynwood, there was testimony concerning a plaintiff's exhibit which was a contract of sale of real estate between Lynwood and Inland, a copy being appended, which contained certain provisions for Lynwood to install water service mains and that the installation would enhance the value of the property and lots, and also that Fitzsimmons testified that sewer and water connections had been made to some of the lots in Arrowhead Subdivision, including Lot 11 in Block 4, in which the defendants counterclaimants Richard H. Bamford and Mary E. Bamford claim an interest.

Gretna filed a verified motion to strike the Inland motion for summary judgment on the grounds Inland was not legally entitled to the relief prayed, alleging that the Gretna lien came into being and was a lien against the property on May 16, 1959, at the time of the contract between Lynwood and Chesterfield; that the common law subdivision plat was placed on record by Lynwood before it was the legal holder of the fee simple title and the plat was of no force and effect as of the date of recording, April 1, 1959; that Lynwood as the contract-purchaser was an owner within the purview

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of the Illinois Mechanic's Lien Law and as such the Mechanic's Lien claim of Chesterfield and its subcontractors became in full force and effect as of May 16, 1959; that at the time the liens came into being, the property had not been subdivided, was in acreage, and the installation of the sewer and water constituted an improvement to the acreage; that the plat recorded April 1, 1959 was a common law plat or dedication which would not have been effective prior to the date of recording of the deeds to Lynwood (previously mentioned) on May 21, 1959; that as a common law dedication the ownership of the lots extend to the middle of the street and therefore the installation of the sewer and water in the so called street was and is an improvement to the lots for which the sewer and water provide utility services.

The copy of the Plat of Arrowhead Subdivision in the record and abstract is certified by the surveyor March 14, 1959, is acknowledged by Lynwood Development Corporation as the owner March 4, 1959, is recorded with the County Recorder April 1, 1959, indicates thereon, inter alia, certain drives, lanes, trails, roads, lots, and blocks, and bears various certificates by the Plan Commission of the City of Wheaton, the Township Highway Commissioner, the County Superintendent of Highways, the County Health Department, and the County Board of Supervisors.

It is the plaintiff's and Gretna's theory that the Trial Court erred in granting the summary judgment for Inland; that they are entitled to mechanic's liens; that their liens attached on May 16, 1959; that there were material controverted issues of fact which remained undetermined; that the work was done in privately owned land and the improvements were connected to and enhanced the value of the abutting lots; and that the plat recorded April 1, 1959 did

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Intelligence Service in the United States. It is therefore requested that the Government of the United Kingdom should provide the Commission with the information requested in the letter of 10th March 1951.

The copy of the letter of introduction from the U.S. State Department to the U.S. State Department is dated 12, 1907, and is addressed to the U.S. State Department, Washington, D.C. The letter is signed by the U.S. State Department and is dated 12, 1907.

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not operate as a conveyance of the streets to the public and there was no acceptance of the streets.

The defendants' theory is that the trial court properly granted their motion for summary judgment for the reason that the labor and materials alleged to have been furnished by the plaintiff and Gretna were furnished upon the public streets, ways and roads abutting upon the defendants-owners' property, and that this rendered immaterial all of the other contentions of the plaintiff and Gretna.

Section 57 of the Civil Practice Act, CH. 110 ILL. REV. STATS., 1961, par. 57, provides, so far as material, as to the procedure on applications for summary judgments or decrees, that:

" * * * The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or a decree as a matter of law. * * * "

The basic inquiry, therefore, here is whether the present record, at this stage, shows that there is no genuine issue as to any material fact and that the defendants, as the moving parties, are entitled to a decree as a matter of law. Summary judgment procedure may not be used to impair the normal right of trial by jury or by the Court; its purpose is not to try an issue of fact, but, *inter alia*, to determine whether an issue of fact exists within the legal meaning; if there is a genuine triable issue of fact the motion for summary judgment must, for that reason, be denied; the right to summary judgment must be free from doubt and determinable solely as a question of law: SIMAITIS v. THRASH (1960) 25 Ill. App. (2) 340. The moving party's right to judgment or decree must be free from doubt to permit a summary judgment or decree: HALLORAN v. THE BELT RY. CO. et al. (1960) 25 Ill. App. (2) 114. Only if the record at the time the motion for summary decree is presented contains all

the facts and information necessary to a decision of the ultimate questions involved and only if the moving party is entitled to a decree as a matter of law can a summary decree be granted: CITY OF QUINCY v. STURHAHN et al. (1960) 18 Ill. (2) 604. Cf. ROWAN et al. v. MATANKY et al. (1952) 348 Ill. App. 296.

Sections 1 and 21 of the Mechanics' Liens Act, CH. 82 ILL. REV. STATS., 1961, pars. 1 and 21, so far as presently material, provide that:

"1. When lien given.) Sec. 1. Any person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, furnish material, fixtures, apparatus or machinery, * * * for the purpose of or in the building, altering, repairing or ornamenting any house or other building, walk or sidewalk, whether such walk or sidewalk be on the land or bordering thereon, driveway, fence or improvement or appurtenances thereto on such lot or tract of land or connected therewith, and upon, over or under a sidewalk, street or alley adjoining; * * * or furnish or perform labor or services as superintendent, timekeeper, mechanic, laborer or otherwise, in the building, altering, repairing or ornamenting of the same; or furnish material, fixtures, apparatus, machinery, labor or services, * * * on the order of his agent, architect, structural engineer or superintendent having charge of the improvements, building, altering, repairing or ornamenting the same, shall be known under this Act as a contractor, and shall have a lien upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to two or more buildings, on two or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date the same is due. This lien shall extend to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein, * * * and this lien shall attach as of the date of the contract."

"21. Sub-contractor's lien - Extent - Owner's Liability - Sub-contracts performed after notice thereof - In case contractor default - May complete - When.) Sec. 21. Every mechanic, workman or other person who shall furnish any materials, apparatus, machinery or fixtures, or furnish or perform services or labor for the contractor, * * * shall be known under this act as a subcontractor, and shall have a lien for the value thereof, with interest on such amount from the date the same is due, from the same time, on the same property as provided for the contractor, and, also, as against the creditors and assignees, and personal and legal representatives of the contractor, on the material, fixtures, apparatus or machinery furnished, and on the moneys or other considerations due or to become due from the owner under the original contract. * * * "

It has been said that the Mechanics' Lien Law is in derogation of the common law, its provisions must be strictly construed, and no one can claim a lien unless it clearly appears the requirements of the law have been complied with: CHONIN et al. v. TATGE (1917) 281 Ill. 336. At the same time, however, the statute itself provides that: "This Act is and shall be liberally construed as a remedial act.": CH. 82 ILL. REV. STATS., 1961, par. 39.

For the present purposes it is to be considered that there is evidently no question but that the plaintiff James B. Glow and Sons, Inc. and the cross defendant and counterclaimant Gretna Material Sales Co. furnished materials, apparatus, machinery or fixtures, or furnished or performed services or labor for Chesterfield Water and Sewer, Inc., the contractor, which latter had a contract of May 16, 1959 with Lynwood Development Corporation, that Glow and Gretna are subcontractors under that Act, and that they normally would have liens for the value thereof, with interest, from the same time and on the same property as provided for the contractor and, also, as against certain parties, on certain other property not presently material. Their liens, if they have such, attached as of the date of the contractor Chesterfield's contract with Lynwood, May 16, 1959:

PITTSBURGH PLATE GLASS CO. et al. v. KRANSZ (1919) 291 Ill. 84, 213 Ill. App. 315; BOYER et al. v. KELLER et al. (1913) 258 Ill. 106. Also for the present purposes it is to be considered that there is evidently no question but that Chesterfield Water and Sewer, Inc., a defendant herein, is a person who by contract, of May 16, 1959, with Lynwood Development Corporation which was, presumptively, the owner at that date of a lot or tract of land, namely, all the real estate embraced within what is referred to as Arrowhead Subdivision, it having a deed of April 23, 1959 for part and a deed of May 18, 1959 for the balance pursuant to its prior contracts to purchase of November 3, 1958 as to part and of September 18, 1958 as to the balance, furnished material, fixtures, apparatus or machinery, or furnished or performed labor or services, or furnished material, fixtures, apparatus, machinery, labor or services on the order of the owner's agent etc. having charge. If what Chesterfield furnished was, within the meaning of the statute, "for the purpose of or in the building, altering, repairing or ornamenting any house or other building, walk or sidewalk, whether such walk or sidewalk be on the land or bordering thereon, driveway, fence or improvement or appurtenances thereto on such lot or tract of land or connected therewith, and upon, over or under a sidewalk, street or alley adjoining", then Chesterfield was a contractor under that Act, and had a lien upon the whole of such lot or tract of land, namely, all the real estate embraced within what is referred to as Arrowhead Subdivision, and upon certain other property not presently material, for the amount due it for such material, fixtures, apparatus, machinery, services or labor, and interest, which lien extended to Lynwood's estate in fee or any other estate or other interest Lynwood had in that lot or tract of land at the time of making such contract, May 16, 1959, or subsequently acquired therein.

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And if that be the case then the subcontractors Clow and Gretna have liens also on the same property as provided for the contractor, namely, all the real estate embraced within what is referred to as Arrowhead Subdivision etc.

The principal cases referred to by the defendants on the matter of mechanics' liens are: SMITH v. KENNEDY et al. (1878) 89 Ill. 485, and CRONIN et al. v. TATGE (1917) 281 Ill. 336. SMITH v. KENNEDY et al. held, in substance, that there was no mechanics' lien on an abutting lot for materials and labor for curbing, grading, and paving the street in front of the lot under a contract with the lot owner, under the then statute giving a lien for labor or materials in "building, altering, repairing, or ornamenting any house or other building or appurtenance thereto on such lot, or upon any street or alley and connected with such building or appurtenance", the matters furnished not being for the "building, altering, repairing or ornamenting any house etc." but for curbing, grading and paving the street, a work wholly disconnected with the buildings, if there were any, on the abutting lot, - no questions were involved as to whether the street was in fact and law a street or as to the status of the title and rights of parties therein. CRONIN et al. v. TATGE held, in substance, that, so far as material, there was no lien on an abutting lot for materials and labor for paving of the street or laying gas and water mains and sewer connections in the street and not connected with the abutting lot, under the then section 1 of the Act which was apparently substantially the same as the present section 1 so far as relevant, - the statute gives a lien for work done or materials furnished for use on a lot or tract of land, or for work done on or materials furnished for any driveway, fence or other improvement on the land or connected with any improvement on the land, being upon, over or under any walk or

[illegible]

street adjoining, - the statute extends the lien to work done and materials furnished for an improvement in the street, but such an improvement must be connected with an improvement on the lot or tract of land, - no questions were involved as to whether the street was a street or as to the status of the title and rights of parties therein.

For the present purposes it is understood that Lynwood Development Corporation contracted November 3, 1958 to purchase certain of the real estate concerned from Wheaton National Bank, as Trustee, and on April 23, 1959 a Trustee's deed for that part was delivered to Lynwood, and that Lynwood contracted September 18, 1958 to purchase the balance of the real estate concerned from Duke S. Durfee et al., and on May 18, 1959 the Durfees' deed for that part was delivered to Lynwood.

Sections 1(a), 2, and 3, of the Plats Act, CH. 109 ILL. REV. STATS., 1961, pars. 1(a), 2, and 3, provide, so far as now relevant, that:

"1. Subdivision of lands into parts less than five acres - Survey - Plat - Stones and monuments.) 1.(a) * * * Whenever the owner of land subdivides it into two or more parts, any of which is less than 5 acres, he shall have it surveyed and a plat thereof made by a Registered Illinois land surveyor, which plat shall particularly describe and set forth all public streets, alleys, * * * "

"2. Certificate of surveyor - Acknowledgment - Record - Registration of titles.) 2. The plat having been completed, shall be certified by the surveyor and acknowledged by the owner of the land, or his attorney duly authorized, in the same manner as deeds of land are required to be acknowledged. * * * The certificate of the surveyor and of acknowledgment, together with the plat, shall be recorded in the recorder's office of the county in which the land is situated, or if the title to the land is registered under the Land Titles Act, shall be filed in the office of the registrar of titles for the county, and such acknowledgement and recording or such acknowledgment and filing as aforesaid, shall have like effect and certified copies thereof and of such plat, or of any plat heretofore acknowledged and certified according to law, may be used in evidence to the same extent and with like effect, as in case of deeds, * * * * * .

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An original plat, having been properly certified, acknowledged, approved and recorded or filed as above provided in this Section, may be retained as the permanent record by the recorder of deeds or registrar of titles, as the case may be, or such officer may use a photographic reproduction of such original plat as the permanent record if such reproduction is securely affixed to a page of the plat book. The film used for any such photographic reproduction shall comply with the minimum standards of quality approved for permanent photographic records by the National Bureau of Standards and the device used to reproduce such plat on film shall be one which accurately reproduces the content of the original plat."

"3. Dedication - Effect of.) 3. The acknowledgment and recording of such plat, or the acknowledgment and the filing of the same as aforesaid, shall be held in law and in equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public, or any person, religious society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives, to such donee or grantee, for their use or for the use and purposes therein named or intended, and for not other use or purpose. And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended."

By this statute the title to a street dedicated to and accepted by the appropriate governmental unit under a proper statutory plat becomes vested in that governmental unit; the statute is in derogation of the common law, however, and a purported plat which does not strictly comply with the provisions of the statute is not a proper statutory plat and is not effective as a statutory dedication of the title to a purported street to the governmental unit concerned; if at the time the purported plat is filed the person filing the plat is not the then owner of the land sought to be platted the purported plat is not a proper statutory plat; such a purported but non-statutory plat has no effect as a conveyance: HIMPFER v. VILLAGE OF FOX LAKE et al. (1929) 334 Ill. 46. Where a purported plat is not acknowledged or recorded until after the title has passed out of the former owner, who had prepared the purported plat, it is a non-statutory plat and is not a valid statutory dedication of any streets or alleys: MCMAHON et al.

is being held, during the present session, and the
approval and passing of the bill is being
now in session at the present time in the House of
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passed. It is not possible to say whether the
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v. BORLAND (1914) 262 Ill. 358. When a purported plat of a town is not made by the owner of the lands covered thereby it is not a statutory plat, and the fee title to the streets and alleys is not in the town, but remains in the adjoining lot owners: INGRAHAM v. BROWN et al. (1907) 231 Ill. 256.

When the purported plat of Arrowhead Subdivision was acknowledged by Lynwood Development Corporation as the owner, March 4, 1959, and when it was certified by the surveyor, March 14, 1959, and when it was recorded, April 1, 1959, Lynwood Development Corporation did not have the legal title to any of the real estate comprising the same. It did not acquire title until April 23, 1959 as to a part and May 18, 1959 as to the balance. At the time of the acknowledgment, certification, and recording thereof the most that can be said is that Lynwood had contracts to purchase the same and may have been the equitable owner. The defendants refer us to no cases holding a party in the position of Lynwood here, as of the acknowledgment, certification, and recording of this purported plat, is an "owner of land" within the particular meaning of those terms in and under the Plats Act, - RHODES v. MEREDITH et al. (1913) 260 Ill. 138 and WARD et al. v. WILLIAMS et al. (1918) 282 Ill. 632, cited by the defendants, deal, inter alia, with the well known principles as to equity regarding a contract purchaser as the owner of the land and the seller as the owner of the purchase money, personalty, under the doctrine of equitable conversion, and do not involve this statute or the present problem. GRIDLEY v. HOPKINS (1877) 84 Ill. 528, the closest case anyone has referred us to, though not wholly the same as the case at bar, is indicative that, in principle, a party in the position of Lynwood here as of those significant times is not an "owner of land"

1. The first of these is the fact that the system is not a simple one. It is a complex one, and it is not clear that the system is a simple one. It is a complex one, and it is not clear that the system is a simple one.

within the particular meaning of this Act and could not make an effectual statutory dedication thereunder. Hence, as of the acknowledgment, certification, and recording of this purported plat, Lynwood was apparently not the "owner of land" embraced therein, within the particular meaning of the Plats Act, this was apparently not a statutory plat thereunder, the acknowledgment and recording thereof apparently did not constitute a dedication or conveyance in fee simple of the purported streets or such portions of the premises platted as are marked or noted thereon as donated or granted to the public, and the fee simple title to the purported streets evidently remained where it was, in Wheaton National Bank, as Trustee, and Duke S. Durfee et al., until transferred by the later deeds of April 23, 1959 and May 18, 1959 to Lynwood. Nor do we believe the purported plat was subsequently retroactively validated by relation back upon the subsequent acquisition, April 23, 1959 and May 18, 1959 by separate deeds to Lynwood of the legal title to distinct parts thereof, under Section 6 of the Conveyancing Act as to the enurement of after acquired titles, CH. 30 ILL. REV. STATS. 1961, par. 6, - THORNTON v. LOUCH et al. (1921) 297 Ill. 204, the only case the defendants cite for that, is not in point, - the Plats Act says nothing about this, - and, in any event, the defendants refer us to no cases as to how whatever intervening rights Glou and Gretna may have acquired May 16, 1959 could be affected thereby.

Further, even if there were a proper statutory plat under the Plats Act, to constitute a complete dedication and conveyance in fee simple of the streets there must be an acceptance thereof by the appropriate governmental unit concerned, by user or some other act indicating acceptance by those authorized in such matters to represent the public, - until such acceptance the plat, though otherwise a

proper statutory plat, is a mere offer to the municipality, it has no rights in the streets, and the fee remained where it was, in the owner: LITTLER v. CITY OF LINCOLN (1883) 106 Ill. 353; IGLEHART et al. v. C. AND A. RY. CO. et al. (1909) 241 Ill. 268; WESTERN SPRINGS PARK DIST. v. LAWRENCE et al. (1931) 343 Ill. 302; Cf. ZEMPLE et al. v. BUTLER et al. (1959) 17 Ill. (2) 434; NIMPFER v. VILLAGE OF FOX LAKE et al. (1929) 334 Ill. 46. We find nothing in the present record to indicate such acceptance. That necessarily being one of the essential elements in the defendants' theory of the case the burden of proof or proceeding thereon was on them.

Moreover, even if there were a proper statutory plat, and a proper acceptance of the fee simple of the streets by an appropriate governmental unit concerned, GRONIN et al. v. TATGE (1917) 281 Ill. 336 seems to indicate that the Mechanics' Liens Act extends the lien to work done or materials furnished for an improvement in the street if such improvement is connected with an improvement on the lot or tract of land abutting, which, of course, evidently may involve here material factual matters as to which there are genuine issues, as well as some uncertain legal questions as to what, within that Act and that case, are "improvements" and what is meant by "connected with an improvement on the lot or tract of land," - which matters cannot be presently determined.

Whether this plat, though apparently not a proper statutory plat and though apparently not resulting in a valid statutory dedication of the purported streets etc. indicated thereon, might or might not be a good common law or non-statutory dedication or grant under which the fee in the purported streets etc. remained in the abutting owners of the legal title subject to some easement in the public, and whether whatever otherwise ostensible lien rights Clow and Gretna may have

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

acquired May 16, 1959 would or would not possibly be affected thereby, would seem to depend on several other facts and circumstances, or the non-existence of such, and the times of occurrence thereof, if they occurred, relating to the acts of the owner or owners of the real estate, the acts of the public and appropriate governmental units, and others, which are not indicated in the present record, and cannot be presently determined.

On the whole, on the present record we cannot say there is no genuine issue as to any material fact and that the defendants are entitled to a decree as a matter of law, - their right to summary judgment is, we believe, not free from doubt, - and the present record does not, we think, contain all the facts and information necessary to a decision of the ultimate questions involved.

The order, accordingly, will be reversed and the cause remanded for further proceedings.

Wright, P. J. concurs
Spring, J. concurs.

REVERSED AND REMANDED.

Wright, J. H.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(Second Division)
OCTOBER TERM, A. D. 1962

39 I.A. 2 280

IN THE MATTER OF THE ESTATE
OF JAMES NORRIS, Deceased

MARGRETHE COLLINS,

Complainant-Appellant

} Appeal from the Probate
} Court of Lake County

SPIVEY--J.

The Probate Court of Lake County at the close of appellant, Margrethe Collins', evidence, entered an order disallowing her claim against the Estate of James Norris. This appeal followed.

Claimant, by her verified claim, states: (1) that in consideration of the waiver and relinquishment of certain rights on her part and in consideration of sums paid out by her on decedent's behalf and in consideration of aid and assistance rendered by her to decedent in and about his business and personal affairs decedent promised that he would convey real and personal property to her which he failed to do, to her damages in the amount of \$500,000.00, and (2) that for the same consideration decedent promised he would make provisions for her by will or other means for her support, maintenance and welfare for the remainder of her life on a scale in keeping with her accustomed manner of living and commensurate with the wealth and affluence of the decedent which he failed to do, to her damages in the amount of \$500,000.00.

On demand claimant filed a verified bill of particulars consisting of twenty-eight paragraphs. We will discuss only the various items therein which were properly argued in appellant's brief and argument.

In Peoples National Bank of Monmouth v. Fernald, 252 Ill.

App. 5, it was said,

"Defendant contends that the trial court erred in permitting a witness to testify to the contents of plaintiff's books of account and to the method of entering credit to plaintiff. No reason is assigned why such testimony is said to be incompetent, and it is not pointed out where such testimony is to be found in the abstract or in the record. Courts of review will not consider alleged errors where a party merely calls attention to items asserting they are errors. (City of Benton v. Blake, 259 Ill. 211; Western Tube Co. v. Pederson, 128 Ill. App. 637.) Not being argued, the alleged errors are waived. (Dumbeck v. Walsh, 179 Ill. App. 239)."

The bill of particulars alleged in part,

"17. That in the spring of 1936 the said James Norris advised claimant that he had arranged to purchase, for the sum of \$750,000.00, a large tract of land at or near the vicinity of Stuttgart, Arkansas; that at such time the said Norris told claimant that he was purchasing the said properties at a foreclosure sale; that the said properties were ideally suitable for the growing, processing and storing of rice and were actually worth considerably in excess of \$750,000.00; that he, Norris, was purchasing the said properties in the name of claimant's said brother, Emil Nielsen; that when title to said properties was cleared he, James Norris would cause said Emil Nielsen to convey said properties to the claimant; that claimant believes that the title to said properties was conveyed to said Emil Nielsen but she has never received any deeds or other documents conveying the title to said properties to her, as was specified by the said James Norris; that the said properties consisted of 27,300 acres of rice land and ware houses for storing and

drying rice and were eventually sold to one Winthrop Rockefeller for the sum of \$3,250,000.00.

"20. That in the year 1944 the said James Norris advised claimant that he would put up the money required for the purchase of the residential apartment building located at 5000 Cornell Avenue, Chicago, Illinois, known as the 5000 Cornell Building; that he, Norris, would furnish the money for said purchase and said building would be placed in claimant's name; that the said property was to be sold at public auction.

"21. That the said Norris advised claimant that he, Norris, would consult his associate, one Arthur M. Wirtz, regarding the desirability of purchasing said 5000 Cornell Building; that the said Norris failed and neglected to purchase said building for claimant, telling claimant that the said Wirtz had advised against said purchase; that the purchase price of the said building at the said time was \$450,000.00 to \$500,000.00." (Emphasis supplied)

The executors of the estate in their verified answer to the claim and to those paragraphs of the bill of particulars herein above set out state they have no knowledge sufficient to form a belief as to the truth of the allegations and conclusions alleged and demand strict proof of the same.

The decedent, James Norris, was born in 1879 and at the time of his death in December 1952 was a man of immense wealth, estimated at two hundred to two hundred and fifty million dollars. His interests and investments were many and varied. He was widowed in 1911 and remarried again in 1919. His widow survived him.

Claimant, Margrethe Collins, met decedent sometime before 1915. She married Thomas Collins in 1919. They were separated many times and were legally divorced in 1938.

Appellant's first assigned error is that the court failed to consider the pleadings in the case as evidence by way of admissions of her claim for \$1,000,000.00.

In this regard it is suggested that it was improper for the attorney of record to sign the answer to the claim and the bill of particulars. She says that the executors or some of them should be the signators thereto. In addition issue is taken to the verification to the answer being made by an agent for the executors. We find no merit in either of these contentions.

In Nichols' Illinois Civil Practice, 1961 Edition, Vol. 2, Sect. 751, it is stated, "Pleadings must be signed by the attorney for the party unless the party appears in his own person, in which case the party must sign." No authority is cited to the contrary.

The verification by Harold Jacobson, on behalf of the executors, who had knowledge of the facts herein pleaded is permitted under Section 35 of the Civil Practice Act, Chap. 110, Sect. 35, Ill. Rev. Stat., which section applies to the verification of all pleadings. No issue is made to the form or substance of the verification.

At the time of filing the answer only three of the original executors, The First National Bank of Chicago and Bruce A. and James D. Norris, sons of the decedent, were serving in the capacity of executors. James D. Norris was in Florida at that time.

Jacobson was Vice President and Secretary of the Norris Grain Company. He had in his possession the records of the decedent and in preparing the answer he consulted in detail the records and Bruce Norris.

In furtherance of this assigned error it is urged that the trial court should have treated appellee's verified answers of no knowledge as admissions of the facts pleaded. She contends that no issue of fact was raised by such an answer in that the answer to the facts pleaded were necessarily within the personal knowledge of the pleader or are of public record or are easily accessible.

Appellant confines her reviewable argument to the allegations stated in paragraph 17 of the bill of particulars.

She argues that the record discloses the ownership of the Stuttgart Rice Plantation was in Southern Rice Products Corporation, that James D. Norris owned a third interest in that corporation, that the plantation was sold to the Rockefellers, that stock in the corporation was inventoried in the decedent's estate and that this stock was sold in 1954 for \$100,000.00, and that because of such showing all of the other allegations of paragraph 17 must of necessity be known or readily available to the pleader.

We cannot follow the rational of the appellant that it would necessarily follow that a conversation between the claimant and the decedent in 1936 amounting to a promise to convey particular real estate would necessarily be within the personal knowledge of the pleader, be of public record or easily accessible.

Secondly, appellant urges error on the part of the court in excluding certain evidence offered on her behalf.

Kathryn Tearney testified that she has been a secretary to claimant since 1944 and they occupied a small office with one telephone. She stated that James Norris would call the office every day he was in town and would leave instructions for claimant. She said that she could always hear the claimant's part of the conversation and that sometimes she could hear Mr. Norris's conversation. She stated that she could not recall the dates of any specific conversations.

The trial court sustained a number of objections to questions propounded to this witness. No offers of proof were made as to what the witness would testify except in one instance. In the absence of an offer of proof being made, upon sustaining of objections to questions asked of the witness, nothing is preserved for review. Smith v. Smith, 5 Ill. App. 2d. 383, 125 N.E. 2d. 693; Sequist v. Alexander, 34 Ill. App. 2d. 8, 180 N.E. 2d. 213; Borrowdale v. Sugarman, 4 Ill. App. 2d. 164, 123 N.E. 2d. 854.

In response to the question, "can you tell us what trips she took during those years?" the witness Tearney stated, "Well,

Mrs. Collins took many trips. She went to New York a number of times. She went to Canada a number of times, and she went to Florida. All business trips." On motion the words "business trips" was struck.

An objection was sustained to a further question, "During the period from 1944 to 1952, did Mrs. Collins devote any time to Mr. Norris' business affairs? Yes or no."

An offer of proof was made as follows:

"Q. Why did Mrs. Collins make these trips?

"A. She made them to look into some business dealings for Mr. Norris.

"Q. Do you know how much of Mrs. Collins' time was spent during those years from 1944 to 1952 attending to the business of Mr. Norris? Answer yes or no. Do you know?

"A. I would say ninety per cent of her time."

Aside from the improper form of the question, the court properly sustained an objection to the offer of proof under the ultimate issue rule. Wawryszyn v. Illinois Central Railroad Company, 10 Ill. App. 2d. 394, 135 N.E. 2d. 154. Wide discretion is committed to the trial judge where opinions and conclusions of a witness go to the very core of a case. Based upon the want of sufficient foundation proof from this witness we cannot say that the trial court abused its discretion in ruling out this proffered evidence. It would have but little probative force in any event.

Lastly, appellant contends that there was ample evidence to support her claim and that the court, in weighing the evidence, as provided by Section 64 (5) of the Civil Practice Act, Chap. 110, Sect. 64 (5), Ill. Rev. Stat., should have so held.

At this point we observe that there is no evidence to support appellant's contention of sums paid out in decedent's behalf or waiver and relinquishment of certain rights, as consideration for her claim. Appellant does not argue to the contrary and apparently bases her entire claim upon the consideration of aid and assistance in decedent's business and personal affairs.

Before we proceed with a discussion of this facet of the case it would be well to first observe some of the well established rules applicable to cases of this nature.

The claim filed in this case is one for damages for breach of a contract. Downing v. Harris Trust & Savings Bank, 318 Ill. 323, 149 N.E. 256, and In re Johnson's Estate, 35 Ill. App. 2d. 275, 182 N.E. 2d. 904.

Claims against estates are scrutinized with care and the burden of proof to substantiate the claim by clear and convincing evidence is upon the claimant.

In Collins v. Utley, 332 Ill. App. 258, 75 N.E. 2d. 36, this court said,

"We recognize the difficulty of establishing a claim of this character but the burden of proving it, as alleged, rested upon Mrs. Collins. It was incumbent upon her to substantiate her claim with clear and convincing evidence. All the evidence shows is that claimant did render some services to the deceased but no agreement upon the part of decedent to pay claimant \$5,000 therefor can be even inferred from this record. The admissions made by a person since dead, are not very convincing and other than those admissions the court must conjecture many things before it can be said that appellee has established her claim. Claims against deceased persons must be scrutinized with care. In re Estate of Teehan, 287 Ill. App. 58, 4 N.E. 2d. 513."

In the case of In re Hanson's Estate, 304 Ill. App. 157 26 N.E. 2d. 175, it was said that courts are not bound to accept testimony, even when uncontradicted, if it is not clear and convincing, or palpably improbable, and that this is particularly true when it relates to statements attributed to persons that have since died; such evidence is liable to abuse; and extrajudicial admissions of a dead man are the weakest of all evidence and are scarcely worthy of consideration.

A promise to make a future gift as an expression of appreciation will not support a claim. Dewein v. Estate of Dewein,

30 Ill. App. 2d. 446, 174 N.E. 2d. 875. The Court said in that case, "The quoted remarks show due appreciation for what had been done, but lack the essential elements of a contract. They are more in the nature of an unenforceable promise to make a future gift as an expression of appreciation." (Emphasis supplied)

Expressions of an intention to do something will not support a claim. A claim must be established by proper evidence that there existed between the claimant and the deceased in decedent's lifetime, a definite contract based upon a consideration which the claimant has performed. In re Carlson's Estate, 286 Ill. App. 81, 2 N.E. 2d. 963; Greenwood v. Commercial Bank of Peoria, 7 Ill. 2d. 436, 130 N.E. 2d. 753; Galapheaux v. Orviller, 4 Ill. 2d. 442, 123 N.E. 2d. 321; Wrestler v. Tippy, 280 Ill. 124, 117 N.E. 404.

Bernice Janis, a maid in the claimant's home, testified to a conversation in 1940 in which Mrs. Collins asked Mr. Norris if he expected to do anything for her future, and he said she did not have to worry about anything that he was very appreciative of all the things she had done for him and he intended to see to it that she would not have anything to worry about.

Dorothy Holberg, a friend of claimant's for forty-five years, testified to a conversation out of the presence of claimant. It took place in New York City in about 1935. She stated that Mr. Norris told her that the claimant acted like she wanted to terminate their association; the claimant was a great help to him; he was very fond of the claimant; and he would provide for the claimant's future welfare. She further testified to a similar conversation in the presence of claimant on the same evening and other conversations in 1937, one of which was in the presence of a Mr. Andrew Hazelhurst.

Witness Holberg testified to a conversation in 1940 or 1941 in which Mr. Norris stated he wanted Mrs. Collins to sue for divorce because he could provide a great deal more for her than her husband and that he would and intended to do that. (Claimant was in fact by her own admission divorced from Mr. Collins in 1938.)

Further testifying, Mrs. Holberg stated that the last time she saw Mr. Norris was in the fall of 1952 in the home of claimant. On that occasion Mr. Norris said he had a farm in Stuttgart, Arkansas, and that it was to be claimant's farm, and that he thought it was a very good investment and as time went on she would realize that it was a very good investment and he wanted to include that in the things he was going to do for her and wanted to do for her.

The claimant testified in her own behalf about a conversation she had with James D. Norris early in 1953 to the effect that decedent's wishes concerning the claimant would be carried out. This conversation was categorically denied by James D. Norris.

As further evidence to substantiate her claim, 97 exhibits were introduced in evidence consisting of letters written by James Norris to claimant between March 19, 1931 and November 10, 1952. These exhibits in the handwriting of the decedent were at the suggestion of the trial court reproduced in typewritten form and occupy over 200 pages of the transcript of record.

It would serve no useful purpose to posterity to attempt to recite and analyze this voluminous correspondence. We have carefully and painstakingly examined each of the exhibits both as to substance and intent.

While we might well further characterize the letters, we adopt the trial court's statement as a fair summation of the contents of these letters when he said, "Nevertheless, taking the letters as a whole, the Court noted that the decedent sent money to the claimant very often, the deceased advised her of the stock and bond market, the deceased solicited his friends to investigate properties for her benefit, and just about every letter had a weather report, family news concerning both her family and his own, and in just about every letter stated how fond he was of the claimant. After reading all of the letters, the Court was left with the impression that the decedent tried to help the claimant in the financial world."

In conclusion we hold that the evidence fails to establish with the clarity required, a definite contract between the claimant and James Norris during his lifetime as alleged in the claim and the bill of particulars.

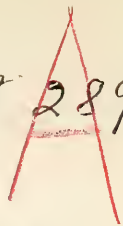
The order disallowing the claim of the appellant is affirmed.

Affirmed.

WRIGHT, P.J. and CROW, J. Concur

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Abstract

No. 11683

Publish Abstract Only

Agenda 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

OCTOBER TERM, A. D. 1962

FILED

FEB 11 1963

PAUL V. WUNDER
Clerk, Appellate Court Second District

NEALE R. SKORBERG and CAL GILLEN,)
Co-partners, d/b/a PROGRESS, INC.,)
et al.,)
)
Plaintiffs-Appellees,)
)
vs.)
)
CITY OF DEKALB, a Municipal)
Corporation, et al.,)
)
Defendant-Appellant.)

Appeal from the
Circuit Court of
DeKalb County.

WRIGHT -- P. J.

This is an appeal from an order of the Circuit Court of DeKalb County entered on July 28, 1962, granting a temporary injunction in favor of plaintiffs, Neale R. Skorberg and Cal Gillen, Co-partners, d/b/a Progress, Inc., against the defendant, City of DeKalb, a Municipal Corporation, and from an order entered on August 9, 1962, denying the defendant's petition to vacate the order of injunction.

The plaintiffs on June 1, 1962, entered into preliminary negotiations with John Cottingham, City Manager of the City of

DeKalb, concerning issuance of building permits for the erection of privately owned student housing units for use by students attending Northern Illinois University located in DeKalb, Illinois. The plaintiffs were assured by the city manager that they had met zoning and other requirements and that building permits would be issued upon the presentation and approval of final plans. Final plans were submitted and approved on June 27, 1962, and building permits were duly issued on July 9, and 10, 1962, by Robert Holdeman, Building Inspector for the City of DeKalb. The applications and building permits were for construction of the following three residences: (1) Permit No. 62-178 for construction of a new building, with English basement, shown on the application as 527 Lucinda Avenue, at the set back line from Lucinda Avenue at the southwest corner of the lot. (2) Permit No. 62-179 for construction of a new building, with English basement, shown on the application as 539 Lucinda Avenue, and (3) Permit No. 62-180 for construction of an addition to an existing dwelling, shown on the application as 541 Lucinda Avenue.

Plaintiffs commenced the erection of student housing on June 28, 1962, in accordance with the plans and specifications approved by the City of DeKalb and entered into contracts with electricians, plumbers and material men and entered into contracts for furnishings, landscaping and driveways to meet the

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standards of the Northern Illinois University, and became indebted and liable for the sum of \$100,000.00 to complete the proposed construction. Before July 23, 1962, plaintiffs had expended over \$40,000.00 for material and labor on the building site. The walls were up and the roof was on one two story building and the foundation of the second building had been completed and some work done toward the construction of the third building.

On July 23, 1962, persons living in the neighborhood of the project filed an appeal to the Zoning Board of Appeals of the City of DeKalb asking that the Zoning Board reverse the issuance of the building permits which had been issued by the building inspector on July 9 and 10, 1962.

The Commissioner of Public Works thereupon issued an order for the plaintiffs to stop work and to maintain the status quo pending a ruling on the appeal by the Board of Appeals. The plaintiffs and their contractors continued to work and several arrests were made by the City of DeKalb charging misdemeanors for working in violation of the zoning ordinance. These cases were still pending at the time of the appeal.

The City of DeKalb on July 27, 1962, filed a complaint in the City Court of DeKalb, Illinois, seeking an injunction to restrain the plaintiffs from doing any work on the student dwellings after the order to stay issued by the Board of Appeals

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The plaintiffs on July 27, 1962, filed a complaint in the Circuit Court of DeKalb County seeking a declaratory judgment and a temporary injunction restraining the City of DeKalb and certain of its officers from interfering with the construction of the student dwellings. These two cases were consolidated in the Circuit Court of DeKalb County into the case now before us for review.

On July 28, 1962, the complaint for temporary injunction sought by the plaintiffs was granted and an order entered restraining the defendant from arresting, prosecuting or molesting plaintiffs and from interfering with the construction of the student dwellings. The complaint for a temporary injunction filed by the City of DeKalb was denied. The injunction order was served upon the City of DeKalb and its officers on August 1, 1962. The City of DeKalb then filed a petition to vacate the order of injunction entered on July 28, 1962, and the court on August 9, 1962, denied the petition. This appeal is taken by the City of DeKalb from the order allowing the temporary injunction entered on July 28, 1962, and the order denying the petition to vacate the same.

The defendant first contends that the appeal to the Zoning Board of Appeals from the issuance of the building permits stayed the proceedings until the administrative remedies were

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exhausted and the court was without authority to enter an injunctive order interfering with the administrative review.

Section 3 of Article 13 of the Revised Zoning Ordinance of the City of DeKalb provides among other things that an appeal may be taken to the Board of Appeals within such time as shall be prescribed by the Board of Appeals by general rule. The record does not disclose that any such rule was ever adopted or prescribed fixing a time limitation for appeal.

The plaintiffs argue that since no time limitation was fixed in the ordinance for taking an appeal to the Zoning Board of Appeals and since the Board of Appeals had not by rule fixed a time limitation, Section 3 of Article 13 of the Revised Zoning Ordinance of the City of DeKalb is null and void on its face as to these plaintiffs. Neither the plaintiffs nor the defendant cite any Illinois cases directly upon this point. However, we believe that since the ordinance did not provide any time within which an appeal may be taken to the Board of Appeals and since no rule was ever adopted or prescribed by the Board of Appeals fixing the time for taking an appeal, that Section 3 of Article 13 of the Revised Zoning Ordinance is null and void. To hold otherwise, a building permit could never be relied on and construction started under a building permit might be stopped at any time by taking an appeal regardless of the amount of work done and money expended in reliance on the permit. *A permittee would never know when construction began by taking*
Commenced.

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Defendant next contends that since the applications for the building permits are signed "Owner-Progress, Inc, per Neale R. Skorberg," and since the permits were granted to "Progress, Inc.," and the complaint for injunction was brought by Neale R. Skorberg and Cal Gillen, Co-partners, d/b/a Progress, Inc., that there is a grave variance between the permits and the complaint and that there was no proper party plaintiff before the Circuit Court. Apparently the defendant is contending that there was a misuse of a corporate name by the plaintiffs in using the title Progress, Inc., when the applications for the building permits were executed, and for that reason these plaintiffs have violated the Business Corporation Act in making their application for building permits and are not proper plaintiffs in this case.

In support of this contention, the defendant cites Illinois Revised Statutes, 1961, Chap. 32, Sec. 157.9 and 211.1; People v. Smith, 342 Ill. 600; Jorgensen v. Baker, 211 Ill. App. 2d 196 and Shore Management Corp., v. Erickson, 341 Ill. App. 571. An examination of these authorities disclose that they are not in point and do not support defendant's contention. The misuse of the corporate name by plaintiffs was not raised in any pleadings at the time the court passed on the complaint for a temporary injunction and further we do not believe that the misuse of a corporation name by the plaintiffs would bar them

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from bringing the suit for an injunction for the reason that the penalty expressed in Section 211.1 of the Corporation Act is exclusive. Grody v. Scalone, 408 Ill. 61; Cohen v. Lerman, 408 Ill. 155.

The defendant further contends that the injunction was issued peremptorily on an insufficient complaint and that defendant was prohibited from filing responsive pleadings to the complaint. The record does not disclose that any attempt was made by the defendant to file responsive pleadings or to file affidavits until after the issuance of the injunction on the plaintiffs' sworn complaint. A motion to dissolve the injunction was filed on July 31, 1962, and denied by the court. Affidavits cannot be received or considered on a motion to dissolve an injunction where no answer or plea has been filed to the complaint prior to the issuance of the order. The correctness of the injunctive order must be determined by the allegations in the complaint. Dunne v. County of Rock Island, 273 Ill. 53. The only question that the court was called upon to determine at the time the order was entered was whether or not the allegations in the sworn complaint were such as to justify the entering of the order. The sworn complaint alleged that building permits had been issued and further alleged that the plaintiffs relying upon these permits had done considerable work and expended large sums of money in and about the construction

from bringing the suit for an injunction and the reason for
the remedy suggested in Section 111 of the Constitution and
is entitled. *Gray v. Nelson*, 405 Ill. 411, 135 Ill. 2d 100.

The defendant further contends that the injunction was
issued prematurely or an insufficient complaint was filed.
Defendant was prohibited from filing responsive pleadings to
the complaint. The court does not believe that any injury
was made by the defendant to this responsive pleading as it
filed an affidavit until after the issuance of the injunction and
the plaintiff's sworn complaint. A motion to dissolve the in-
junction was filed on May 31, 1934, and denied by the court.

Affidavits cannot be received in consideration as evidence
themselves in injunction where no answer or other plea has been filed in
the complaint prior to the issuance of the order. *Gray v. Nelson*,
405 Ill. 411, 135 Ill. 2d 100.

One of the fundamental rules must be determined by the
allegation in the complaint. *Gray v. Nelson*, 405 Ill. 411, 135 Ill. 2d 100. The only question that the court was asked was
to determine at the time the order was entered was whether or
not the allegations in the sworn complaint were true or
justified the granting of the order. The sworn complaint alleged
that plaintiff's business had been injured and further alleged that
the plaintiff's rights were being injured and some constructive
work and suggested large sums of money to and from the defendant.

of the student dwellings, following the approval of the final plans and the issuance of the building permits. In the face of these allegations, we believe the trial court was justified in granting the complaint and ordering the writ to issue.

Defendant also contends that the plaintiffs acted at their peril when they proceeded with the construction of the housing units when they knew an appeal had been taken from the decision issuing the building permits and an order to stop construction had been entered by the Zoning Board. *2 July*

The final plans for the construction of the student dwellings were submitted to and approved by the City Manager of the City of DeKalb on June 27, 1962, and building permits were issued by the building inspector on June 9 and 10, 1962. During this period of time and up until July 23, 1962, the plaintiffs purchased land, secured loan commitments, hired a building contractor and proceeded to erect part of the housing units. Since we hold that Section 3 of Article 13 of the Revised Zoning Ordinance of the City of DeKalb, which provides that an appeal may be taken to the Board of Appeals from the issuance of a building permit is null and void because no time is fixed by the ordinance and no time has ever been adopted or prescribed by the board within which such appeal may be taken, we do not believe that the plaintiffs were bound by the stay order entered by the Board of Appeals.

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these allegations, the school building was located in
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Belmont also contends that the plaintiff's action is barred
by the statute of limitations which the defendant is now
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The court finds that the defendant's action is barred by
the statute of limitations which the defendant is now asserting
that the plaintiff's action is barred by the statute of limitations.

During the period of time from July 1, 1900, to June 30, 1900,
the defendant's action is barred by the statute of limitations.

During the period of time from July 1, 1900, to June 30, 1900,
the defendant's action is barred by the statute of limitations.

The court in Deer Park Civic Ass'n. v. City of Chicago, 347 Ill. App. 346, 106 N. E. 2d 823, stated:

"The general rule is that any substantial change of position, expenditures, or incurrence of obligations under a building permit entitles the permittee to complete the construction and use the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning."

We believe that this rule should apply as well to a case such as the instant one where for some reason not disclosed in the record the defendant decides to revoke the building permits which had been issued and on which the plaintiffs relied. The general rule is that a city cannot be estopped by an act of its agent beyond the authority conferred upon him. *Rippinger v. Niederst*, 317 Ill. 264. A person dealing with a governmental body takes the risk of having accurately ascertained that he who purports to act for it stays within the bounds of his authority and that this is so even though the agent himself may have been unaware of the limitations on his authority. *Federal Crop Ins. Corp., v. Merrill*, 332 U. S. 380. However, this general rule is qualified to enable a party to invoke the doctrine of estoppel where his action was induced by the conduct of municipal officers and where, in the absence of such relief, he would suffer a substantial loss and the municipality would be permitted to stultify itself by retracting what its agents had done. *Cities Ser. Oil Co., v. City of Des Plaines*, 21 Ill. 2d

The court in *North v. City of Dallas* (1982) 730 F.2d 1308, 53 AFTR2d 82-1211 (CA-5, 1982) affirmed the Tax Court's decision in *North* and held that the City of Dallas was not entitled to a refund of the taxes paid by the decedent.

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1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem and the resources that will be required to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan of action. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in solving the problem and whether any adjustments need to be made.

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157; River Forest State Bank v. Village of Hillsdale, 6 Ill.
2d 451.

In the instant case the issuance of the building permits and permitting the plaintiffs without any objection or interference whatsoever to proceed with the construction of the student dwellings as they did, and expend large sums of money and make other commitments in and about the construction of the dwellings constitutes conduct on the part of the city authorities that amounts to a ratification of the permits and ~~that the city is estopped from interfering with the construction.~~

The facts and circumstances as disclosed by the record in this case conclusively show that the plaintiffs relying upon the building permits, which were issued by the building inspector, expended large sums of money toward the construction of the student dwellings and did substantial work toward the completion before any objection or protest was made or any action taken to revoke the building permits and stop the construction. These facts, we believe, establish that plaintiffs acquired a vested right to complete and to use the dwellings, and that the trial court in the exercise of sound discretion did not commit error in granting the complaint for a temporary injunction and entering the order enjoining the City of DeKalb from interfering with the construction of the dwellings in question and in denying the motion of the defendant, City of

DeKalb, to dissolve the injunction.

For the reasons herein stated, the orders of the Circuit Court of DeKalb County are affirmed.

A F F I R M E D.

Spivey, J. Concur.

SPIVEY, J. and CROW, J. Concur

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Spivey, J. and G. W. J.

SPIVEY, J. and G. W. J.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1962

1st DIVISION

(59 I.A.-2 366)

DEBRA ASPLAND, a minor, by Glen
Aspland, her father and guardian,
and GLEN ASPLAND,

Plaintiffs-Appellees,

vs.

BETTIJEAN M. McMASTER,

Defendant-Appellant.

Appeal from the
Circuit Court,
Winnebago County.

McNEAL, P.J. -

Plaintiffs Debra Aspland, a minor, and her father, Glen Aspland, sued defendant Bettijeane McMaster in the Circuit Court of Winnebago County for damages for personal injuries sustained by Debra and for medical expenses incurred by her father as a result of defendant's alleged negligence in driving her automobile into Debra while she was riding on a bicycle. A jury returned a verdict finding defendant guilty and assessing damages for Debra at \$10,000 and her father's damages at \$3000. Judgment was entered on the verdict. Defendant's post-trial motion was denied, and this appeal followed.

Defendant's theory on appeal is that the verdict was against the manifest weight of the evidence, and that the trial court erred in giving plaintiffs' instructions 1 and 4 and in refusing defendant's tendered instructions 14, 15 and 16. No point is raised on the pleading.

According to the evidence, at about 3:00 P.M. on July 14, 1959, plaintiff Debra Aspland, aged six years in May, 1959, was riding her bicycle south on Green Street near its intersection with Union Street in Rockton. Defendant Bettijeane McMaster was driving her 1956 Ford west on Union Street. The Ford and the bicycle collided near the northwest corner of the intersection, and Debra was seriously injured.

Testimony relative to the injury and hospitalization was not considered pertinent on this appeal and was not abstracted. Union Street was a through street protected by stop signs at the northwest and southeast corners of the intersection. The street was a two-way street wide enough for two lanes of traffic and parking lanes on each side. The pavement was dry. The weather was clear and hot.

Earlier Debra and her brother Frank, then nine, and Allan Hall, about ten, had been at a root beer stand located two or three blocks from the intersection where the collision occurred. The boys and Debra left the stand on their bicycles at about the same time. As Frank and Allan were riding south on Green Street, Allan slowed down for the Union Street intersection, and Frank got ahead of him 10 or 15 feet. Neither of them stopped before entering the intersection. They rode their bicycles into a park located at the southwest corner of the intersection. Debra was about a half block behind the boys as they crossed the intersection. Allan Hall testified that he turned around to see where Debra was and saw her turning toward the west,-- trying to swerve out of the way of the car. The car and the bike came together near the northwest corner of the intersection. Frank Aspland didn't see the car hit his sister. He heard the noise of the accident, looked around and saw her rolling. He jumped off his bicycle, ran over, and pulled Debra from underneath the car,--right in front of the wheel. He got on his bike and took off for home to tell his mother.

Mrs. McMaster testified that she had traveled about two blocks west on Union Street and was driving her car 20-25 miles an hour as she approached the intersection. Her two-year-old daughter was riding in the front seat beside her. When she was 100 to 150 feet east of the intersection she saw two boys on bicycles 50 or 75 feet north of the intersection. She applied the brake and slowed the car down to a speed of 15 miles per hour. She saw a group of 15 or 20 children along the south side of Union Street about the middle of the block west of Green. Her car was about 25 feet from the boys on bicycles as they were

crossing Union Street. They turned and went west near the curb along the south side of Union. She was watching the boys for fear they might swing back in front of her and didn't see Debra before the accident. When she was about 25 feet west of the west edge of the intersection she heard the sound of the bicycle colliding with the car. She immediately put the brakes on hard and stopped within 4 or 5 feet. Her daughter fell to the floor of the car. After the car stopped she put her daughter back on the seat and then got out to see what had happened.

Gary Lee Pavlakovic, then 15, testified that he and Jim Reidy were standing near the northeast corner of the park about 50 feet west of Union. He saw Mrs. McMaster's car when it was just coming up over the hill about 120 feet east of the intersection. He said that the car was going about 35 miles an hour just before it hit Debra, that the right front fender struck her, that the bicycle went under the right tire of the car, that Debra was hung on the bumper, and that the car went about 60 feet after the impact. He also said that there were skid marks about 35 feet long which started about 50 feet from the westerly edge of the intersection, and that the car struck Debra 15 to 20 feet before the skid marks started. Jim Reidy didn't see the car hit Debra, but he heard a thud, turned around, and saw the car come to a stop. He testified that Debra was under the front right bumper of the car.

Harold Gilmore, a police officer, testified that when he arrived Debra was lying in front of the car and the bicycle was under the front bumper, that the car was 62 feet from the west line of Green Street, and that the skid marks started at a point 28 feet west of the west edge of the intersection and extended 34 feet to the wheels of the car where it was stopped on the street.

Defendant's counsel concedes that a child under the age of seven cannot be charged with contributory negligence, but he contends that the acts of a minor may be the sole proximate cause of her injury.

In the case at bar, however, defendant filed a jury demand, and a jury became the fact-finding body in this case. The questions of negligence and proximate cause were pre-eminently matters of fact for the jury, and not for the trial court or this court to consider and decide. *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 84; *Johnson v. Skau*, 33 Ill. App. 2d 280, 285.

Defendant knew that children were in the vicinity of the intersection and she was required to exercise a degree of care and vigilance commensurate with the greater hazard created by their presence or probable presence. Whether her conduct measured up to that required of an ordinarily prudent driver under those circumstances and whether her lack of care caused the accident were questions of fact for the jury. *Stowers v. Carp*, 29 Ill. App. 2d 52, 64. Mrs. McMaster admitted that she did not see Debra before the collision. Defendant's testimony that she was traveling only 15 miles an hour when she struck Debra and that she stopped her car within 4 or 5 feet was contradicted by the testimony of other witnesses upon which the jury could have found that her speed was 35 miles an hour and sufficient to produce 34-foot skid marks after the impact. On this evidence the jury determined that defendant was negligent and that her negligence was the proximate cause of plaintiff's injuries and damages. A jury's determination will not be disturbed unless against the manifest weight of the evidence or unless an opposite conclusion is clearly evident. *Mullen v. Chicago Transit Authority*, 33 Ill. App. 2d 103, 111; *Arboit v. Gateway Transportation Co.*, 15 Ill. App. 2d 500, 507. We cannot say that the jury's verdict is against the manifest weight of the evidence in this case.

Appellant contends that she did not receive a fair trial because the court gave plaintiffs' instructions 1 and 4. Instruction 1 follows:

"There was in force in the State of Illinois at the time of the occurrence in question, a certain Statute which provided that: No person shall drive any vehicle upon any

public highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property; or is greater than the applicable maximum speed limit established by this Statute. The fact that the speed of a vehicle does not exceed the applicable maximum speed does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection or when special hazard exists with respect to pedestrians or other traffic; and speed shall be decreased as may be necessary to avoid colliding with any person or vehicle. In an urban district the maximum speed is 30 miles per hour.

"If you decide that the defendant violated the Statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not the defendant was negligent before and at the time of the occurrence."

At the conference on instructions, defendant's counsel said:

"Well, I object to plaintiff's instruction No. 1 on the basis there is not any evidence to support it. That there is no evidence of excessive speed nor is there any evidence of a special hazard of pedestrians. It does not set forth in its entirety the statute, but it is a summary of the statute. I object to it for that reason as not being applicable to the facts." In this court, however, appellant's counsel now complains that the instruction was prejudicially erroneous because it omits the following italicized portions of the last sentence of section 49 of the Uniform Act Regulating Traffic on Highways (Par. 146, Ch. 95½, Ill. Rev. Stat.), viz.: " * * * and speed shall be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care", and

because it contains the following: " * * * in an urban district the maximum speed is 30 miles per hour." It should be noted that appellant's counsel made no objection at the conference to the inclusion of the arbitrary 30-mile-per-hour speed limit in the instruction and that he did not specify the portion of section 49 omitted from the instruction.

Plaintiffs' instruction 4 reads as follows:

"At the time of the occurrence in question, in this case, it was the law of the State of Illinois that the driver of a motor vehicle proceeding along a preferential highway has a duty to observe due care in approaching and crossing the intersection, and to drive as a prudent person would to avoid a collision when the danger is discovered, or by the exercise of reasonable care, should have been discovered.

"If you decide that the defendant violated this law on the occasion in question, then you may consider that fact together with all other facts and circumstances in evidence in determining whether or not the defendant was negligent before and at the time of the occurrence."

At the conference counsel's objections to instruction 4 were:

1 - It is not in IPI. 2- It is not a statutory provision. 3 - No authority where it has been approved. 4 - It singles out the duty of a driver on a preferential highway as against other persons. 5 - It is an improper statement of the law and is improper to be given as an instruction in that form or content. In this court appellant complains: that the instruction invades the province of the jury by assuming a material point in issue, i.e. the existence of danger at or near the intersection in question; that an instruction which assumes the existence of danger is erroneous; that it singles out and unduly emphasizes not a general duty of care, but the specific duty of "the driver of a motor vehicle proceeding along a preferential highway"; that it converts language from Conner v. McGrew, 32 Ill. App. 2d 214,

217, 177 NE 2d 417, into an instruction applicable to a different case and set of facts; and that the instruction is argumentative. None of the complaints now urged was presented to the trial court except the fourth point made at the conference, and in our opinion the instruction was not erroneous by reason of this objection.

Where proper specific objections are not made at the conference, errors in instructions are not preserved for our consideration. *Russo v. Kellogg*, 37 Ill. App. 2d 336, 341; *Jackson v. Gordon*, 37 Ill. App. 2d 41, 45; *Onderisin v. Elgin, J. & E. Ry. Co.*, 20 Ill. App. 2d 73, 77; *Arboit v. Gateway Transportation Co.*, 15 Ill. App. 2d 500, 511. Further, the failure to make specific objections to instructions at the conference is not cured by making such objections in the post-trial motion. *Russo v. Kellogg*, 37 Ill. App. 2d 336, 342. Nevertheless we have considered instructions 1 and 4, and in our opinion they contain no reversible error.

IPI 60.01 prescribes a pattern for instructions involving violation of statutory provisions. Plaintiffs' instruction 1 follows this pattern and purports to set forth the provisions of section 49 of the Uniform Act Regulating Traffic on Highways, Par. 146, Ch. 95½, Ill. Rev. Stat. Under "Comment" the authors of IPI 60.01 state that if judicial interpretation has modified the language of a statute, the change must be reflected in the instruction. The statutory provisions relative to traffic at intersections with preferential highways have been judicially construed. *Conner v. McGrew*, 32 Ill. App. 2d 214, 217; *Pennington v. McLean*, 16 Ill. 2d 577, 583. Plaintiffs' instruction 4 reflects the judicial interpretation of such statutory provisions. Neither instruction is peremptory. Both tell the jury in the language of the last paragraph of IPI 60.01 to consider such statutory provisions or modification thereof, in determining whether or not defendant was guilty of negligence at or before the occurrence. Since the principal plaintiff was a minor and incapable of contributory negligence, the statutory provisions involved were applicable only to

the defendant and her right to a fair trial was not improperly prejudiced by either of these instructions.

By tendered instructions 14, 15 and 16 defendant requested the court to give the jury the provisions of sections 24, 70 (b) and (c), and 86 (c), respectively, of the Uniform Act Regulating Traffic on Highways, Pars. 121, 167 (b) and (c), and 183 (c), Ch. 95 $\frac{1}{2}$, Ill. Rev. Stat. Instruction 14 and section 24 provide that a person riding a bicycle shall be subject to the provisions of that Act applicable to the driver of a vehicle. Section 86 (c) set out in instruction 16 prescribes the place where a vehicle shall be stopped when so required by a stop sign, and section 70 (b) and (c) included in instruction 15 sets forth the duties of drivers of vehicles at through highway intersections. As indicated above, however, these statutory provisions have been construed as neither imposing an absolute liability upon the party approaching from the non-preferential highway, nor conferring an absolute right-of-way regardless of all circumstances on the party traveling on the preferential highway. ⁵⁸³ Pennington v. McLean, 16 Ill. 2d 577, 584. Where courts of review have placed a modified construction upon a statute, an instruction given in the language of the statute should be framed according to that construction so as to properly inform the jury as to its legal effect. DeLegge v. Karlsen, 17 Ill. App. 2d 69, 78.

Appellant contends that she was entitled to instructions 14, 15 and 16 to support her theory of the case, - that the collision occurred at an intersection where she had a right to certain assumptions with respect to intersecting traffic. This theory was adequately covered by defendant's instruction 17, which told the jurors that if they found that Mrs. McMaster was in the exercise of ordinary care and that she had the right-of-way at the intersection, until there was notice to the contrary defendant had the right to assume that vehicles entering Union Street would yield the right-of-way to her.

Further, instruction 17 avoids a confusing provision contained in instructions 14, 15 and 16, which purports to exempt Debra from responsibility for contributory negligence, and then emasculates the exemption.

In our opinion the trial court properly refused defendant's instructions 14, 15 and 16, there was no reversible error in plaintiffs' given instructions 1 and 4, and the verdict was not against the manifest weight of the evidence. The judgment of the Circuit Court of Winnebago County is affirmed.

Affirmed.

DOVE, J., and SMITH, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION

1st DIVISION

MAY TERM, A. D. 1962

(39 I A² 367)

L. C. MILLER, CHARLES A. THOMAS,	:	
FRANCIS E. HICKEY, and WILLIAM E.	:	
COLLINS, co-partners, d/b/a MILLER,	:	
THOMAS, HICKEY & COLLINS,	:	Appeal from the
	:	
Plaintiffs-Appellees,	:	Circuit Court of
	:	
v.	:	Winnebago County.
	:	
STEPHEN A. PAOLI,	:	
	:	
Defendant-Appellant.	:	
	:	

Smith, J.

Plaintiffs, a firm of attorneys, recovered a judgment against the defendant for services rendered in the sum of \$3,238.57. Within thirty days thereafter the defendant filed his motion to vacate the judgment and for leave to file an amended answer and counter-claim. This motion was supported by affidavit. The motion was denied by the trial court and this appeal followed.

The plaintiffs filed their suit in September, 1960. Defendant's appearance was entered by Attorney Jack R. Cook. The record then shows three demands for bill of particulars, compliance with two and a motion to strike the third demand which the court allowed. In January, 1961, defendant answered and demanded a jury trial. Jury demand was withdrawn in May and the cause set for trial on October 3, 1961. Defendant was apprised of the trial date by Mr. Cook and was present with one Harold Martin, an attorney, at 9:30 on the morning of the third.

Mr. Martin apparently did not represent the defendant but spoke for an undisclosed Chicago firm who might represent him. The Court was then preoccupied with naturalization proceedings and the case was recessed over until 1:30 in the afternoon. This apparently was not done in open court. However, the record is clear that both Mr. Martin and the defendant were aware of this fact. Neither appeared at 1:30 and the proceedings thereafter were conducted with them in absentia.

The first order of business was the withdrawal of Mr. Cook as attorney for the defendant. Mr. Cook testified that the defendant was unhappy with his representation and so advised him on September 29; that on September 30, defendant told him he didn't want him as an attorney; that Cook then again told him the case was set for trial and he should get other representation; that again on October 2, Cook advised the defendant that he would not represent him and that he should get another lawyer to represent him the next day; that both Martin and the defendant were at the court house at 9:30 the following day, the trial date; that about 12:30 Martin advised Cook that neither he nor the defendant would be present at 1:30.

Mr. William E. Collins, one of the plaintiffs, testified that the clerk of the court advised him of the 1:30 setting and he relayed the information to Mr. Martin in the presence of the defendant, Paoli. The Court then permitted Mr. Cook to withdraw as attorney of record and directed the plaintiff to proceed with his proof. Detailed evidence of the services rendered by the plaintiffs was then heard and a judgment duly entered for the sum of \$3,238.57. It is this judgment which the defendant seeks to vacate and then file an amended answer and counterclaim.

Defendant in his brief characterizes the foregoing proceedings as "a travesty on the orderly administration of justice". Close scrutiny of the motion, the supporting affidavit and exhibits and the conduct of the parties suggest the ineptness of this characterization. There is no charge whatsoever that the defendant was mislead by anyone, no denial that the defendant knew of the setting and was present in or near the court room, no charge of any lack of knowledge on the part of the defendant, no charge of fraud, negligence or misconduct on the part of anyone and no denial of the facts as hereinabove recited. The case was at issue. This the defendant knew. The case was on the trial call. This the defendant knew. Cook would not represent the defendant. This the defendant knew. The case was to be called at 1:30. This the defendant knew. He and Mr. Martin elected to be absent for reasons which are wholly undisclosed by the record. The defendant had fired Mr. Cook. The defendant knew and admits this in his brief. In his motion and affidavit defendant says he is not indebted to the plaintiffs, that a part of the services was rendered for a partnership of which he was a member, that the plaintiffs owe him some money, and that he has had no opportunity to present his defense to the court. For over a year he had the opportunity to amend his answer and file his counter-claim. It wasn't done. He was not denied the right to appear on the trial date and make his wants known. He had his day in court but elected, for reasons known only to himself, not to avail himself of the opportunity afforded. The loss of his day in court, if it was lost, lies squarely on his own doorstep.

Under Sec. 50(6) of the Civil Practice Act (Sec. 50 (6), Chapt. 110, Ill. Rev. Stat. 1961) a trial court has the power to set aside a final judgment on motion filed within 30 days upon "any terms and conditions that shall be reasonable". Such a motion is addressed to the sound discretion of the trial court.

Western Casualty Co. v. Biggs, 6 Ill. App. 2d 368, 127 N.E. 2d 518; Dunivant v. Dunivant, 5 Ill. App. 2d 481, 125 N.E. 2d 836. He exercises equitable powers and the judicial conscience in its finest texture. But, "a court of equity is only moved to action by diligence, and does not interpose to protect one who has not exercised proper diligence to protect his own interests and to make a defense which was available to him in a court of law." Till v. Kara, 22 Ill. App. 2d 502, 508, 161 N.E. 2d 363, 365. The facts in the case at bar were strikingly similar to the case just quoted. This is not a default matter. The case was at issue. It was reached on the call. The defendant elected not to be present or be represented. Why this is so is a complete mystery. If the action of the trial court in this case is a "travesty on the administration of justice", it was the defendant who wrote the script. He leaves a total void as to any reason or excuse for his conduct. There was no abuse of discretion. Indeed, orderly procedure required the court to proceed with the orderly dispatch of its business. This it did and the defendant shows no reasonable grounds or basis for disturbing that action.

The judgment of the Circuit Court of Winnebago County is, accordingly, affirmed.

Affirmed.

McNeal, P. J. and Dove, J., concur.

Abstract

No. 11658

Publish Abstract Only

Agenda No. 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION

1st DIVISION

MAY TERM, A. D. 1962

39 I.A.² 368

DONALD B. DORLAND,

Plaintiff-Appellee,

v.

RICHARD E. STEINBRECHER,

Defendant-Appellant.

Appeal from the

Circuit Court of

McHenry County.

Smith, J.

This is an Illinois suit for the enforcement of a judgment in favor of the plaintiff in the Municipal Court of Los Angeles. The defendant filed his answer and counter-claimed for the value of "certain machine parts, materials and labor". Plaintiff filed his motion under C. P. A. 48, Ill. Rev. Stat. 1961, Chapt. 110 Par. 48 contending that the matter was res adjudicata because of the California judgment. The trial court allowed plaintiff's motion, dismissed the counter-claim and entered judgment in bar of the counter-claim. This appeal is from that judgment order.

Defendant-appellant's theory is that the California judgment is not res adjudicata for the reason that the causes of action asserted by him in California and here are not the same and do not involve the determination of the same material fact or facts. Defendant's counterclaim in California sought recovery

on three counts alleging (1) to recover possession of a certain machine, (2) its reasonable rental because of use by the plaintiff and (3) the value of certain items, enumerated, taken by the plaintiff. Defendant lost on all three claims in California.

In the instant suit defendant asserts that his assignor, Pacific Cork Corporation, furnished certain materials, machine parts and labor, all unspecified, to the plaintiff at defendant's request and that said assignor expended about \$4,100.00 for said purposes and the plaintiff failed to pay on demand. It should be here noted that both the instant defendant and Pacific Cork Corporation were defendants and counter-claimants in California and it is alleged here that Pacific assigned all its interest and claim against the plaintiff to the Illinois defendant.

Plaintiff's motion under C. P. A. 48, cited above, asserts "that the matters and things set forth in the instant counter-claim are res adjudicata, having been determined in the Municipal Court of Los Angeles". The motion is supported by certified copies of the Los Angeles proceedings and by affidavit as required by C. P. A., Par. 48 and Supreme Court Rule 15, Ill. Rev. Stat. 1961, Chapt. 110 Par. 101.15. It would be redundant to say that these facts must be accepted as true unless contradicted or negated in some appropriate manner by the record before us. In his brief defendant says "the physical things involved in the two suits are patently different". No counter-affidavit identifying the "certain machine parts, materials and labor" were filed. They remain unidentified in this record. Yet, the motion of the plaintiff claims that "the matters and things set forth in the instant counter-claim are res adjudicata". Thus the fact of prior adjudication stands unchallenged, undenied and unattacked.

in the record before us. Accepting, as we must, that that fact is true it is patent that the judgment of the trial court is correct and must be affirmed.

Accordingly, the judgment of the Circuit Court of McHenry County shall be, and it is hereby affirmed.

Affirmed.

McNeal, P. J. and Dove, J. concur.

39 1 A^{2nd} 378

48812

JAMES J. MALONEY & EDWARD B.
CUNNINGHAM d/b/a MALONEY,
CUNNINGHAM & DEVIC,

Appellants,

v.

CREST FINANCE CO., INC., an
Illinois Corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a judgment entered for the defendant, Crest Finance Co., Inc., after a trial by the court without a jury.

On September 29, 1960 James J. Maloney and Edward B. Cunningham, d/b/a Maloney, Cunningham & Devic, started suit in the Municipal Court of Chicago. In their statement of claim they alleged that the parties by an agreement in writing dated May 29, 1959 for a "valid legal consideration" promised to pay to the plaintiffs \$6,000 which represented the amount due, and that the defendant made numerous payments to the plaintiffs aggregating \$3,200. Plaintiffs prayed for judgment for the balance of \$2,800. The exhibit referred to in the statement of claim, and which was attached thereto, was a letter written on the stationery of Crest Finance Company, Inc., addressed to Maloney, Cunningham and Devic, attention of Mr. J. Maloney. The letter reads as follows:

"Dear Mr. Maloney:

"We agree to pay you \$6,000.00 on December 1, 1959 as full and final payment of the personal loan to Bill Fitzgibbons and John A. Citro in the amount of \$10,153.07.

"You are to furnish a complete release of this liability upon receipt of our check.

"Very truly yours,

CREST FINANCE CO., INC.

Leo Niederberger
President"

On December 12, 1960 the defendant filed a defense in which it admits that it executed the document attached to the plaintiffs' statement of claim as an exhibit, but "denies that the said document constituted a contract or agreement, and states that any alleged contract was without legal consideration." The court heard the case without a jury.

The abstract is incomplete and inaccurate. It was necessary to go to the record to get any kind of a picture of what transpired during the trial. In People v. N. Y. C. R.R. Co., 388 Ill. 382, 58 N.E.2d 51, the court said:

"A duty rests upon a party prosecuting an appeal to this court not only to furnish an adequate abstract, conforming to Rule No. 38, (Ill. Rev. Stat. 1943, chap. 110, par. 259.38,) but to include in the record the evidence essential to the disposition of the contentions urged."

People ex rel. Rose v. Craig, 404 Ill. 505, 89 N.E.2d 409, lays down the same rule and says: "A reviewing court does not search the record for the purpose of reversing a judgment. * * * [Cases cited.]" The court also said: "Failure to comply with Rule No. 38 by submitting an abstract properly presenting the errors relied upon warrants a court of review in affirming the judgment. Department of Finance v. Sheldon, 381 Ill. 256; Department of Finance v. Rode, 376 Ill. 374."

Three witnesses testified for the plaintiffs. The defendant called one of those witnesses as its witness. At the close of all the evidence the court found for the defendant, and on February 23, 1962 judgment in favor of the defendant was entered.¹

It appears from the record that a note had been given to the plaintiffs by Fitzgibbons and Citro which had been placed in the Mid City National Bank for collection. The note was not introduced in evidence, and while one of the witnesses for the plaintiffs testified that it was in his possession he stated he could not find it. From the record it appears that the Crest Finance Company, Inc., the defendant, had after December 1, 1959 sent checks to the plaintiffs at various times totaling \$3,100. On behalf of the plaintiffs certain ledger sheets were admitted in evidence. Two of those sheets appear in the abstract but do not appear in the record. On oral argument counsel for the defendant made no objection to the court treating the ledger sheets appearing in the abstract as though they had been in the record. From those ledger sheets and from the testimony of Edward Cunningham, a partner, it appears that the B. J. Bakeries, Inc., Citro and Fitzgibbons were indebted to the plaintiffs in a sum in excess of \$10,000, and it further appears that the amount was reduced to \$6,000 and the balance written

¹The abstract indicates that the court decided the case on a motion made by the defendant at the close of plaintiffs' evidence. This is not borne out by the record. Such a motion was made but later counsel for the defendant stated he was withdrawing such motion.

off as a bad debt on December 15, 1959. The letter which was attached as an exhibit to the statement of claim also was offered by the plaintiffs in evidence and admitted, but does not appear in the record. The defendant admitted that the letter had been sent; hence we will consider it. Edward Cunningham further testified that after he had received the letter of May 29, 1959 he did nothing.

Walter F. Cunningham testified that he was the attorney for the plaintiffs and stated that as attorney for the plaintiffs he took over the negotiations in the transactions with the defendant and that there were further conversations with representatives of the defendant and letters exchanged between the plaintiffs and defendant. Among other things he testified that he had received a letter from the defendant December 2, 1959 and that on the same date he wrote defendant a letter. The letter of December 2, 1959 was admitted in evidence but does not appear in the record. He further stated that after the plaintiffs had received the December 2nd letter from the defendant he talked with Neiderberger, the president of the defendant, and he told Neiderberger that he had before him Neiderberger's letter and said that plaintiffs were willing to go along with that arrangement. The witness further testified that Neiderberger said "all right," and the witness then wrote a letter to the defendant, which was plaintiffs' exhibit 4, and which the court

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refused to admit in evidence, though no point was raised on this by the plaintiffs. The witness further testified that after he had written the letter (exhibit 4) Neiderberger again called him in December 1959 and said he wanted to make some different arrangement for payment and the \$6,000 was due, and that the witness told him that it was the defendant's trouble and not his. The witness, further testifying concerning his conversation with Neiderberger, said that if "we would continue, they would pay \$1200.00 if we would take the balance at \$100.00 a week—or a month—I forget, week or month, monthly payments at that time."² The witness stated that he said he would have to discuss this with his clients, that he afterwards called Neiderberger back and said plaintiffs were willing to go along, and that he dictated a letter which he sent to his brother (plaintiff Edward Cunningham) to write on the firm's stationery and to send to the Crest Finance Company, Inc. That letter was offered in evidence on behalf of the plaintiffs and was refused admission by the court. No point is made on that ruling. The witness further testified that no payments were made by the defendant between May 29, 1959 and December 1, 1959, nor during the period did he make any demands on Fitzgibbons or Citro. He testified that he had several conversations with them and that they said Neiderberger objected to the way they were handling the deal they had made with him, and they stated that Neiderberger

²The bookkeeper for the defendant testified that no single check for \$1,200 had been sent to the plaintiffs.

had said for them to come to see him and make some different arrangements. The record is confused. Certain letters received by the plaintiffs from the defendant were identified as exhibits on behalf of the plaintiffs. Four of those letters were admitted but they do not appear in the record, and it is impossible to even determine the dates of the letters which were admitted in evidence. The witness also testified that he had various conversations during this period with . Neiderberger and that he had called Neiderberger several times between July 5th and July 12th to answer "my letter of July 5, confirming the understanding"; that "Mr. Neiderberger said to me: 'Cunningham, we are still having difficulty with Fitzgibbons and Citro. They are not paying out,'—and so on and so forth. Well, I said, I want this thing confirmed, and he said, 'Well, the understanding is correct, but I wouldn't write any letter', period." The witness was then asked as to whether at any time the letter of May 29, 1959 and the agreement therein were changed, that is, the original letter, and the witness answered: "What was done, I can't answer that very well, except to say what was done, what was shown by the correspondence in the file and evidenced by the Court." The witness further testified that he did not participate in any of the transactions, if any there were, between the plaintiff and the defendant, before May 29th.

After both sides rested and after arguments of counsel the trial court took the case under advisement.

The problem confronting this court in deciding this case is not the application of the law to the factual situation

. 7 .

but is the utter lack of facts to which any legal rule can be applied. No negotiations or discussions between the parties before the sending of the letter of May 29, 1959 by the defendant to the plaintiffs are presented, and therefore that letter must be considered as an offer made to the plaintiffs. That letter provided that defendant was to pay the plaintiffs \$6,000 on December 1, 1959 as "full and final payment" of the loan of Fitzgibbons and Citro in the amount of \$10,153.07. The letter further stated that the plaintiffs were to furnish a complete release of liability upon receipt of the \$6,000 check. There is nothing in this letter which asks that the plaintiffs forbear from collecting the loan from Fitzgibbons or Citro, nor does it in apt terms provide that that loan should be reduced from over \$10,000 to \$6,000. It merely provides that the plaintiffs are to furnish a complete release on December 1st on receipt of defendant's check. In order to have a contract it is necessary that there be a meeting of the minds of the parties. There must be an offer and an acceptance, and acceptance must either be directly communicated to the offeror or expressed by the doing of some overt act contemplated by the terms of the offer in such way that notice will be presumed. 12 I.L.P. Contracts, sec. 38. Here the plaintiffs did nothing from May 29th to December 1st. There was a note made out by Citro and Fitzgibbons, and the ledger sheet indicates that they were to pay six percent interest after default. This note was apparently dated April 1, 1958, and the payments on it were to be \$100 a month starting September 1, 1958. The amount of the note was \$10,920.67. Whether that amount was

reduced by payments to the amount set out in the letter of the defendant we have no way of knowing.

It is true that in Illinois a contract may be made for the benefit of a third person and such a contract is valid. However, the same rule applies to contracts of this nature as applies to other contracts. There must be an acceptance and a consideration. Under the facts and evidence in the case before us, if we could consider the transaction a contract, it would be between the plaintiffs and defendant for the benefit of Fitzgibbons and Citro. The record shows no answer of the plaintiffs to defendant's letter of May 29th. No communicated acceptance on the part of the plaintiffs appears in the record. There was no release of any part of the debt of Citro and Fitzgibbons by the plaintiffs. The mere charging off of the excess of the debt over \$6,000 as a bad debt on the ledger sheet of the plaintiffs constitutes no consideration. It is not a release of the debtors. Apparently some new agreement was entered into between the parties sometime subsequent to December 1, 1959. What that agreement was we have no way of knowing. Certain payments were made by the defendant to the plaintiffs but whether they were made in accordance with the new agreement or not we have no way of determining. We are confronted with a vacuum.

There were various conversations and various letters exchanged between the plaintiffs and the defendant. Those letters do not appear in the record. The trial court had all of those letters before it and was in a much better position than we are to determine what the transaction was. Nevertheless,



during the argument the trial court stated: "The thing that baffles me is the lack of testimony which should have come out in the plaintiffs' case."

The court in its judgment order found the issues against the plaintiffs. We have an incomplete transcript of the proceedings had before the trial judge, and we must presume that upon the evidence before him there was sufficient evidence to justify the entry of the finding. McGurn v. Brotman, 25 Ill.App.2d 294, 167 N.E.2d 12; County Board of School Trustees v. Bendt, 30 Ill.App.2d 329, 174 N.E.2d 404; Smith v. Smith, 36 Ill.App.2d 55, 183 N.E.2d 559; People ex rel. Rose v. Craig, *supra*.

The judgment of the Municipal Court of Chicago is affirmed.

Affirmed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

A

EARL M. SMITH, Executor of the
Will of Frank A. Anderson,
Deceased,

v.

Defendants-Appellees.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendants moved to dismiss the action and the court sustained the motion. The order, after stating that the defendants' motion to dismiss was well founded, concluded as follows: "It is Therefore Ordered that the petition for a writ of mandamus be dismissed." The plaintiff appealed and the defendants have moved to dismiss the appeal on the ground that the order is not final.

With certain exceptions, the Appellate Court has jurisdiction to review only final judgments, orders and

decrees. (Ill. Rev. Stat., 1961, ch. 110, sec. 77(1).) Orders, such as the one in question, which dismiss the complaint but do not dismiss the suit, have been held to be neither final nor appealable. In the recent case of Griffin v. Board of Education of the City of Chicago, 38 Ill. App. 2d 79, 186 N.E.2d 367 (1962), the order appealed from read: "IT IS HEREBY ORDERED that the Amended Complaint is hereby stricken and dismissed." This court cited six cases, from 1905 to 1960, in which similar orders had been held nonfinal, and concluded: "The order in this case does not differ in any material respect from those in the cases cited. It is not a final order from which an appeal lies and the defendant's motion to dismiss is therefore granted."

In a still more recent case, Cady v. Hartford Fire Insurance Company, No. 48740, opinion filed January 30, 1963, the same conclusion was reached. The order appealed from was as follows: "IT IS ORDERED that the complaint of Elwyn L. Cady against the Hartford Fire Insurance Company, a corporation, be, and the same is hereby dismissed." This court stated: "The order entered in the case before us is not a final order from which an appeal could lie. The appeal is dismissed."

An order almost identical to the present one was before the court in Satterfield v. Fairfield Drainage District, 15 Ill. App. 2d 293, 145 N.E.2d 514 (1957). The final sentence of the order was: "It is, therefore, ordered that the writ of mandamus as prayed in the above entitled cause be and the same hereby is denied." The Appellate Court said: "...this is not, according to the authorities, a final judgment. Certainly

-3-

it does not contain the essential elements of a final judgment, and, therefore, the appeal must be dismissed."

The authorities referred to by the court included People v. Board of Education, 236 Ill. 154, wherein the trial court sustained a demurrer to a petition for a writ of mandamus. The Supreme Court held that the order dismissing the petition was not final, and said: "Under our statute mandamus is an ordinary action at law and is governed by the same rules of pleading as are applicable to any other actions at law (Dement v. Rokker, 126 Ill. 174; People v. Crabb, 156 id. 155.)"

The order in this case is not final, this court does not have jurisdiction to consider it and the motion to dismiss will be allowed.

Appeal dismissed.

Schwartz and McCormick, JJ., concur.

Abstract only.



48609

PAULINE BARRETT, individually and
as administratrix de bonis non of
the estate of HENRY WHITE, deceased,

Plaintiff-Appellee,

v.

MARTHA E. CARTER and EVERETT J.
HILL,

Defendants-Appellants.

392-400
APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of distribution which determined the respective interests of the parties in a condemnation award. The property had been held in joint tenancy by Henry White and his wife Mary. The matter was before this court in White v. White, 28 Ill. App. 2d 19, 169 N.E.2d 839, and reference is made to that case for a more complete statement of the facts. There, this court held that under a quitclaim deed executed by Henry White in 1955, Everett J. Hill became the owner of Henry White's interest. We remanded the cause with directions to permit the parties to amend their pleadings "to the end that a full accounting may be had upon all financial items in dispute."

Upon remandment the court again referred the matter to a master in chancery for an accounting. The parties stipulated that no new evidence would be presented and that the master should render a report based on the evidence he had theretofore heard. The master made a report finding defendant Hill liable for \$575, being one-half the amount expended on the direction of Mary White for installation of a heating system. The master found that the condemned building was enhanced in

value by the cost of that installation. He also found that Hill was liable for \$416.67, being one-half the amount paid to an attorney for defending the property in the condemnation suit. Only these two items are now in controversy. The trial court overruled the exceptions of Hill and entered a decree of distribution in accordance with the master's findings. Defendant appeals from the decree of distribution.

We will consider, first, the propriety of the court's decree charging Hill with \$575 as his share of the cost of installing the heating system. Defendant argues that it was improper to make that charge because Mary White had forged her husband's name to the installation contract, and he invokes the doctrine that one must come into equity with clean hands. The unclean hands doctrine is concerned not so much with the effect of a party's past acts or conduct as with the intent with which such acts were performed. It applies to wilful as distinguished from negligent conduct and to conduct which is "unconscionable" or "morally reprehensible." Shinsaku Nagano v. McGrath, 187 F.2d 753 (7th Cir., Ill. 1951). Where a layman acts believing he is justified, without intention to cheat or defraud, the mere fact that his action is a breach of some legal duty will not make the act unconscionable. Vangel v. Vangel, 254 P.2d 919 (Cal. 1953); Ferrick v. Barry, 63 N.E.2d 690 (Mass. 1946). We must determine whether plaintiff's conduct was unconscionable or morally reprehensible.

Mary White was an elderly woman, a layman in regard to the law. She had been managing the premises herself. She paid the taxes and the cost of minor items of repair. She

testified that she had the heating system installed because the boiler, the only source of heat in the building, was not **functioning**. Although her husband was not living at home, they were not formally separated. He was illiterate and could barely sign his name. Plaintiff paid for the installation of the boiler out of the rents she had collected, that is, one-half of the total rents. She had no knowledge of defendant Hill's interest in the property. There is no evidence indicating fraud. Under the facts, we cannot find that plaintiff's action was unconscionable. Therefore she should not be barred from obtaining equitable relief.

Defendant asserts that Mary White is estopped from making any claim for contribution because under the chancellor's decree rendered prior to the decision in White v. White, supra, the court adjudicated the matter. That proceeding not only involved the claim of Hill to an interest in the premises, but also an accounting between Henry and Mary White. With respect to that accounting the chancellor found that as between Henry and Mary White, Mary had no interest in the moneys remaining in the possession of the County Treasurer. At the same time the chancellor found that Hill had no interest whatsoever in the premises. It was not until after the reversal and remandment of that cause that the issue arose as to whether Mary White could compel contribution from Hill for installation of the heating system. The previous decree of the chancellor is not res judicata of that issue. We will now proceed to consider the question.

Defendant argues that a cotenant who does not consent

to improvements cannot be compelled to contribute a proportionate share of the price thereof. The rule in Illinois is that a nonconsenting cotenant will be charged, not with the price of the improvement, but only with his proportion of the amount which at the time of partition it adds to the value of the premises. Heppe v. Szczepanski, 209 Ill. 88, 70 N.E. 737; Noble v. Tipton, 219 Ill. 182, 76 N.E. 151. The master found that the improvements enhanced the value of the common property to the extent of ^{the} amount expended therefor and defendant filed no objection to that finding nor did he include it as an exception before the chancellor. The point is made for the first time in this court. A party dissatisfied with the conclusion of a master and chancellor cannot stand idly by and for the first time make his point in a reviewing court. Kraus Bond & Mtge. Org. v. Vicari, 300 Ill. App. 192, 20 N.E.2d 865; Severy v. McDougall, 190 Ill. App. 193. Defendant should be charged with one-half of the increased value of the premises due to the improvement. Thus he was properly charged with \$575.

This \$575 would be a proper credit to Mary White, who installed and paid for the heating system. However, in the accounting between Henry and Mary White, the chancellor found that Henry had contributed funds to Mary and concluded that any moneys remaining in the Treasurer's possession (which otherwise would go to Mary White) should go to Henry White. Therefore it was proper to credit the estate of Henry White with the \$575 in question.

The next item is whether Hill should be charged with \$416.67, one-half of the \$833.33 paid by the County Treasurer

of Cook County to the attorney who represented the property in the condemnation proceedings. In 1958 Henry and Mary White employed A.M. Burroughs as their attorney. They filed their application with the County Treasurer, representing that they were the parties entitled to receive the condemnation award; that they were the record owners of the property; and that they had not executed any deed conveying any right, title or interest in the property other than to the condemnor thereof. The quitclaim deed to Hill was not recorded. Neither Mary White nor the attorney knew of Hill's interest. The Treasurer paid the \$833.33 to the attorney for representing the owners of record in the condemnation proceedings.

Defendant interprets the situation as if the attorney's fee had been incurred for personal services rendered to Henry and Mary White. A more realistic view is that the attorney had been employed by the Whites for the protection and benefit of whoever might ultimately be found to be the owners of the property. The time and energy he expended in the litigation was in the interest of those owners. As we view it, the situation is precisely the same as if Mary White, who did not know that her husband had sold his interest, had herself employed the attorney to appear in the condemnation suit on behalf of whoever were the owners of the property.

The issue before this court is whether a cotenant who in good faith defends the property in a condemnation suit has the right to authorize the payment of fees to the attorney out of moneys held for the owners of the property. A tenant in

common, in an accounting with the other tenants in common, is allowed remuneration for all disbursements for the recovery, defense or protection of the property. Gosselin v. Smith, 154 Ill. 74, 39 N.E. 980. A tenant in common has the right under this rule to authorize payment of the attorney who defended the property in a condemnation suit out of moneys held for the owners of the property. Defendant Hill should be charged with \$416.67.

Decree affirmed.

Dempsey, P.J., and McCormick, J., concur.

A

JOHN KAKES,

[illegible]

APPEAL FROM THE
MUNICIPAL COURT
OF CHICAGO.

Defendant-Appellant.

Plaintiff's Statement of Claim alleged defendant's failure to repay a loan of \$1,000. Defendant answered, denying plaintiff's allegations, and filed a Counterclaim seeking repayment of loans to plaintiff totalling \$2,160. After trial without a jury, the court entered judgment for \$1,000 against defendant on the Statement of Claim, and on the Counterclaim found the issues in favor of the plaintiff-counter-defendant. Defendant appeals from both parts of the judgment order.

Plaintiff owned a liquor store which he wanted to sell. Defendant was the salesman from whom plaintiff bought his supplies, so defendant, apparently to keep the account, sought to help plaintiff find a buyer. Defendant, in fact, agreed to furnish the money for a Mr. Adams who indicated willingness to buy plaintiff's store.

On June 1, 1960 plaintiff, defendant, Adams and a certified public accountant met to determine the value of the business and arrange the sale. The meeting was very informal. The accountant worked out the figures on a sheet of paper and a price of \$2,310 was agreed upon. Against that amount the purchaser was given credit for \$600 which plaintiff owed defendant for liquor the

-2-

latter had paid for on behalf of plaintiff. Defendant then gave plaintiff his check for \$710 and it was agreed that the balance of \$1,000 would be paid by defendant to plaintiff on the following Friday.

Defendant's principal contention is that the allegations of the Statement of Claim do not correspond with the proof, since the facts which the court considered as having been established, did not prove a loan, but rather a debt on an oral contract of sale.

To constitute error, such a variance between pleading and proof must be material and substantial. (Miller v. Arliskas, 324 Ill. App. 588.) We conclude that the variance, if there were one at all, was slight and immaterial. When the terms of the transaction were agreed upon, plaintiff was entitled to full payment. He accepted a partial payment and gave defendant a few days to pay the balance of \$1,000. The obligation to pay was shown to have existed, and it was not unreasonable, under all the circumstances, for plaintiff and the trial court to have considered it in the nature of a loan.

Defendant also argues that the trial court erroneously refused to admit certain exhibits into evidence which he asserts would have supported his Counterclaim. It would appear from the brief on this point that the question was submerged in the court's decision on the rest of the case. In any event, however, the particular point was not preserved in the abstract in a way which would enable us to review the matter. (Jackson v. Gordon, 37 Ill. App. 2d 41, 45 (1962).)

We consider it unnecessary to recite the testimony in detail. This case fits precisely into the rule which prevents us from disturbing the trial court's decision unless we determine that it is clearly contrary to the manifest weight of the evidence. We could not reach such a conclusion in this case without substituting our judgment for that of the trial court in assessing the credibility of the witnesses, and that we are not permitted to do.

This principle of law, controlling in the instant case, is so well settled as to require the citation of no authority. The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

BURMAN, P.J., and MURPHY, J., concur.

PUBLISH ABSTRACT ONLY.

39 IA² 494

48740

ELWYN L. CADY,

Appellant,

v.

HARTFORD FIRE INSURANCE
COMPANY, a Corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

On June 28, 1961 Elwyn L. Cady filed a complaint in the Superior Court of Cook County seeking to recover under the provisions of an insurance contract which he entered into with the Hartford Fire Insurance Company, a corporation. On motion of the defendant the court dismissed the complaint. It is from this order that the plaintiff has appealed.

The complaint alleged in substance that the plaintiff, a Missouri resident, had entered into an insurance contract on October 1, 1959 with the defendant, and that the insurance policy afforded the plaintiff protection for certain buildings from damages occasioned by windstorm and hail. He further alleged that on June 29, 1960, while the policy was still in full force and effect, a storm damaged and partially destroyed his insured buildings, resulting in damages of \$3,500. The plaintiff also alleged that pursuant to certain Missouri statutes, he elected to have the defendant repair the buildings, and that the defendant disclaimed liability and refused. The plaintiff claimed that the defendant's failure to perform was vexatious and unjustified, and sought to invoke another Missouri statute entitling the plaintiff to attorney's fees. He prayed for \$3,500 compensatory damages,

\$35,000 punitive damages, plus interest and costs. In the alternative the plaintiff sought an order of specific performance of statutory obligations to repair. With the filing of the complaint the plaintiff filed a demand for a jury trial.

On August 11, 1961 the defendant filed a motion to dismiss the complaint. The motion was based upon three separate grounds: (1) forum non conveniens; (2) non-residency of the plaintiff and his failure to comply with paragraph 3, chapter 33, Illinois Revised Statutes, requiring a non-resident of the State of Illinois to file security for costs; and (3) insufficiency of the complaint at law to state a cause of action. In support of the motion the defendant filed an affidavit asserting (1) that the insurance contract was issued in the State of Missouri and its provisions are governed by the law of that State; (2) that the plaintiff is a resident of Missouri, the defendant is licensed to do business in that State, and the property over which the dispute exists is located in that State; (3) that three of the witnesses the defendant will have to call in the trial of the cause live in Missouri; (4) that the Illinois courts are powerless to enter a decree of specific performance requiring positive acts of an Illinois defendant in another State; and (5) that the backlog of jury cases now pending in the Superior Court of Cook County is so large that the case at bar could not possibly come to trial in the normal course of events in at least five years.

On November 10, 1961 the trial court entered the following order:

"This cause coming on to be heard on the motion of

the defendant to dismiss the complaint, the Court having heard arguments of counsel and being advised in the premises:

"IT IS ORDERED that the complaint of Elwyn L. Gady against the Hartford Fire Insurance Company, a Corporation, be, and the same is hereby dismissed. It is further ordered that defendant have and recover of plaintiff its costs herein expended and have execution thereof."

Since the plaintiff has elected to appeal from this order it is incumbent upon this court to ascertain whether the order is final, and one from which an appeal may be prosecuted. The order merely dismisses the complaint and awards costs to the defendant. The same facts were before the court in Aetna Plywood & Veneer Co. v. Robineau, 336 Ill. App. 339, 83 N.E.2d 896. Section 77 of the Civil Practice Act provided then, as now, that appeals shall lie to the Appellate or Supreme Courts in cases where any form of review may be allowed by law to revise final judgments, orders or decrees. The court in that case said:

"The court entered an order that on motion of the attorney for defendants 'to enter judgment in favor of said defendants or to dismiss the complaint filed herein; and the court having heard arguments of counsel and having been fully advised in the premises, finds that said complaint is insufficient in law to sustain plaintiff's action,' and concluded by saying that 'it is therefore ordered that said complaint be and the same is hereby dismissed at the plaintiff's cost.'"

Within thirty days the plaintiff filed a motion to vacate the order and to file an amended complaint instanter. The court denied the motion. Plaintiff appealed from both orders. In the opinion the court cites and quotes from Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473, stating:

"Appellant was plaintiff and appellee was defendant

in this suit in the circuit court of Cook County. That court sustained the general demurrer of the defendant to the declaration and the plaintiff elected to stand by the declaration. The recital of said facts in the record is followed by this judgment: "Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor," * * *

"The judgment was not final and the statute only authorizes appeals from final judgments. The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final. (Wenom v. Fossick, 213 Ill. 70; 11 Ency. of Pl. & Pr. 925.) * * *."

In Griffin v. Board of Education of the City of Chicago, 38 Ill. App.2d 79, 186 N.E.2d 367, the trial court had entered an order sustaining a motion of the defendant to strike the amended complaint, and in that order set out that the court sees no just reason to delay appeal of this order. In the opinion we said:

"The last sentence in the order: 'The Court sees no just reason to delay Appeal of this Order' is superfluous. Such an express finding makes an order final and appealable only in those cases involving multiple parties or claims for relief, and where an order, decree or judgment is entered as to one or more but fewer than all of the parties or claims. 111 Rev Stats (1961) c 110, § 50(2). This case is against one defendant and for one claim."

We held that the order was not a final order from which an appeal lies, and sustained the defendant's motion to dismiss the appeal, citing Chicago Portrait Co. v. Chicago Crayon Co., supra; Prange v. City of Marion, 297 Ill. App. 353, 17 N.E.2d 616; Bd. of Ed. of Grant Com. H. S. Dist. No. 121 v. Bd. of Ed. of Richmond-Burton Com. H. S. Dist. No. 157, 301 Ill. App. 228, 22 N.E.2d 400;

Thompson v. Contreras, 340 Ill.App. 527, 92 N.E.2d 340;
Johnson v. City of Rockford, 26 Ill.App.2d 133, 169 N.E.2d
534; and Aetna Plywood & Veneer Co. v. Robineau, supra.

In Johnson v. City of Rockford, supra, the court
said:

"Where the order merely sustains defendant's
motion to strike complaint without stating more,
such order is not a final appealable order, and
appeal therefrom must be dismissed, even though
the question of jurisdiction is not raised by the
parties. Tilton v. Ludwig, 327 Ill. App. 202,
63 N.E.2d 527."

The greater part of the argument in the briefs filed
in this court deals with the question whether the court could
properly dismiss the suit because of the objection of
forum non conveniens.¹ As we have pointed out the order of
the trial court did not dismiss the suit, and so this question
is not properly before us.

The order entered in the case before us is not a
final order from which an appeal could lie. The appeal is
dismissed.

Appeal dismissed.

Dempsey, P.J., and Schwartz, J., concur.

¹The motion to dismiss the complaint is based upon three
separate grounds. The record does not show the ground
upon which the court acted.

Publ. in 1962

No. 11684

Publ. in 1962

Agenda No.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
OCTOBER TERM, A. D. 1962

FILED
FEB 11 1963

PAUL V. WUNDER
Clerk Appellate Court Second District

39 IA^{2nd}-495.

JACQUELINE L. SLONE, Administrator:
of the Estate of CLYDE VON SLONE,
deceased,

Plaintiff-Appellant,

vs.

EVA G. MORTON,

Defendant-Appellee.

Appeal from the
Circuit Court of
Peoria County.

SMITH, J.:

Plaintiff appeals from a judgment in bar of her suit for loss of support under the Illinois Dram Shop Act, Ill. Rev. Stat. ⁵⁴¹ ~~Chapt. 43~~ ⁽³⁾ ~~Sec. 135~~ (1959). She had alleged that the defendant caused the intoxication of one Schwindenhammer as a result of which he drove his automobile into that of plaintiff's husband, thereby causing his death. She further alleged the employment of her husband as a salesman and the use of his earnings exclusively for the support of himself, his wife and minor child and prayed judgment for \$20,000.00. Issue was joined by an appropriate answer denying these allegations.

After issue thus joined defendant filed her motion for summary judgment, supported by affidavit, asserting that others had paid the plaintiff amounts in excess of \$20,000.00 under the Wrongful Death Act, Ill. Rev. Stat. ⁵²¹ ~~Chapt. 70~~ ⁵

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Exhibit 11

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IN THE

FEDERAL COURT OF DISTRICT

SOUTHERN DISTRICT OF NEW YORK

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Par. 1 et seq. (1959), and that such amount, being in excess of the amount recoverable under the Dram Shop Act, was a complete bar to this suit. The trial court allowed the motion for summary judgment and entered an appropriate judgment in bar. Plaintiff then filed her motion to vacate the judgment and for leave to file an amended complaint. Attached to the motion was a proposed amended complaint alleging that her total loss of support aggregated \$42,500.00; that others had paid her \$22,500.00 which should be credited, and prayed judgment for the balance of \$20,000.00 under the Dram Shop Act. The trial court denied the motion and this appeal followed.

[1] Appellant first contends that summary judgment procedure was inappropriate as the subject matter of the motion should have been raised earlier in the case either by motion under C. P. A. Sec. 48, Ill. Rev. Stat., ²¹ ~~Chapt. 110, Par. 48~~ (1959), or under C. P. A. Sec. 43(4), Ill. Rev. Stat., ²¹ ~~Chapt. 110, Par. 43(4)~~ (1959). We deem it unnecessary to determine whether the subject matter of defendant's motion was appropriate to the use of either of these sections of the C. P. A. That it might or could have been so used does not mean that it must have been so used. The summary judgment provisions of C. P. A. Ill. Rev. Stat., ²¹ ~~Chapt. 110, Par. 57(3)~~ (1959) reads:

"The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law."

The defendant's affidavit set forth specifically the payment of \$22,500.00 by others under the Wrongful Death Act, the acceptance thereof and the execution and delivery of covenants not to sue by authority of the Probate Court of Peoria County, and attached a copy of the Probate Court proceedings. No counter-affidavits were filed. The plaintiff's proposed amended complaint demonstrates

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ART. 1 (1952) and ART. 2 (1952) which in effect of the present

provisions under the same Act, was a complete law to this effect. The

total amount allowed for the purpose of the present law and entered in appropriate

judgment in fact. I think that the law was to create the judgment and for

issue in the an amount of 100,000. It was to be a provision was a provision

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that the facts stated in the affidavit are true and that no counter-affidavits could have been filed. The payments made stand admitted. The facts stated in the motion for summary judgment must be taken as true. There is no "genuine dispute of a material fact" (2) The trial court properly functioned under summary judgment procedure in so finding. Whether it functioned properly is the question before us.

[2nd 5] We deem the motion of the plaintiff to vacate the judgment adequate to reach the ultimate issue in this case. "The purpose of the summary judgment procedure is not to try an issue of fact, but rather to determine whether there is an issue of fact. . . . If there is a material issue of fact, it must be submitted to the jury. The right of the moving party to a judgment should be free from doubt." Midwest Grocery Co. v. Danno, 29 Ill. App. 2d 118, 123, 172 N.E. 2d 648, 651. It appears that the moving party's right to a judgment must not only be free from factual doubt but that he must also show that he is "entitled to a judgment or decree as a matter of law" (2) C.P.A. Sec. 57(3), noted above. In testing the motion of the defendant for summary judgment this court examines and considers the whole record before it and may even consider the sufficiency of the complaint although no motion has been directed to it. Moore v. Pinkert, 28 Ill. App. 2d 320, 171 N.E. 2d 73. We thus come face to face with the question whether as a matter of law the affidavit and motion of the defendant support the judgment that the plaintiff take nothing by her suit. We are impelled to hold that they do not.

The cases are legion which hold that the Dram Shop Act and the Wrongful Death Act create different statutory rights and duties. Their differences, history, philosophy and purposes have recently been amply and fully considered by our Supreme Court. Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157; Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E. 2d 153. Lengthy analysis of these two

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1985-1986

(continued from page 79)

1970-1971

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cases would appear to be pointless duplicity. In Izzo, at page 79, the Court said:

"Because of these and other distinctions between the two acts we have held that the two acts are separate and distinct and that the nature and amount of damages provided for in the Liquor Control Act are not to be limited (O'Connor v. Rathje, 368 Ill. 83, 12 N.E. 2d 878) or expanded (Howlett v. Doglio, 402 Ill. 311, 83 N.E. 2d 708, 6 ALR 2d 790) by the provisions of the Wrongful Death Act. . . .

"A comparison of the two acts reveals that the General Assembly did not contemplate that the Wrongful Death Act should supplant or supplement the remedy it carefully created and limited."

We would not quarrel with this statement if we could. We could not quarrel with it if we would. We have carefully studied both acts and there is nothing in either that suggests that either the one or the other is a delimitation of or an enlargement of the other. We can find nothing in either that suggests that the pursuit of a remedy under one against a certain class of wrongdoers is an election to abandon any suit against another class of wrongdoers under the other.

In Cunningham, the Supreme Court held that the Dram Shop Act provides the only remedy against tavern operators and owners of tavern premises for injuries to person, property or means of support, by an intoxicated person or in consequence of intoxication. It refused to allow a common law action not based on the Act. It thus seems clear that to bar this action, as we are asked to do, exculpates the defendant tavern operator from liability by the use of a statute which does not control her. It would exculpate her because of payments made by others under a statute which was not intended either to supplant, enlarge or supplement the Dram Shop Act.

The defendant urges, however, that to permit recovery in the instant suit is to permit a double recovery or double satisfaction for a single injury.

But does it? We necessarily observe that there was but one death—but one basic injury from which the damages flow. We also necessarily observe that, in our modern economy, the damages flowing from this one death may, realistically, be in excess, as a matter of fact, of the aggregate permissible recovery under both acts. In each act the legislative dollar ceiling is the only recoverable loss under the particular act. We do not understand the legislature to have established the total "loss of support" or "pecuniary injuries" actually sustained, but only the limit recoverable under each act. Under the proposed amended complaint, the totality of damage from the single death is alleged to be \$42,500. ~~\$22,500~~ has been paid by others and should be properly credited. How can it be said that the recovery of the \$20,000 ~~\$20~~ balance under the Dram Shop Act permits a double recovery or double satisfaction in whole or in part?

But the defendant suggests that since "pecuniary injury" under the Wrongful Death Act includes "loss of support" under Dram Shop, payment under the former necessarily includes satisfaction of "loss of support" under the latter. That "pecuniary injuries" comprehend and include "loss of support" is well established. *McClure v. Lence*, 349 Ill. App. 341, 110 N.E. 2d 695; *McCormick v. Kopmann*, 28 Ill. App. 2d 169, 161 N.E. 2d 720; *Hall v. Gillins*, 13 Ill. 2d 26; 147 N.E. 2d 352. We neither quarrel with that principle nor do we repudiate it. The term "pecuniary injuries" is much broader in scope than "loss of support". *Hall v. Gillins*, noted above. Where the plaintiffs are widow and lineal kinsmen a presumption of loss arises from the relationship without proof of actual loss. *Howlett v. Doglio*, 402 Ill. 311, 83 N.E. 2d 708. It even includes loss of instruction and moral and intellectual training brought about by the death of the father. *Coddard v. Ensler*, 222 Ill. 462, 76 N.E. 805. It is abundantly clear that "loss of support" and "pecuniary injuries" are not synonymous. Since they

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA, in its decision in *United States v. Gurnea*, 401 U.S. 104, 110 (1970), stated that the "primary purpose of the Federal Rules of Criminal Procedure is to protect the rights of the accused." The Court further stated that the "primary purpose of the Federal Rules of Criminal Procedure is to protect the rights of the accused."

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are not as a matter of law synonymous, nor do they embrace the same considerations, how can we say they are mutually exclusive as a matter of law.

[6] In the case at bar, the plaintiff alleges a totality of loss from a single death of \$42,500.00. We approve plaintiff's willingness to credit \$22,500.00 already received for "pecuniary injuries" to reduce the totality of damages.

In so doing, we merely approve the philosophy of *Aldridge v. Morris*, 337 Ill. App. 369, 86 N.E. 2d 143, that we are not "adjusting the burdens of misconduct but ~~are~~ merely assuring a single recovery for the damages sustained, rather than sanctioning as many complete recoveries as there may be defendants." Under the proposed amended complaint the plaintiff will receive no double recovery either in whole or in part. By recovering the maximum under the Dram Shop Act, she will recover only the totality of damages she says she has sustained. Under the pleadings in this case, the fact of total damages amounting to \$42,500.00 is a triable issue, the payment of \$22,500.00 is not disputed and the balance of \$20,000.00 is necessarily a triable issue of fact. Under the issues made by these pleadings the elements comprising the \$22,500.00 are immaterial. *DeLude v. Rimek*, 351 Ill. App. 466, 115 N.E. 2d 561. It is the fact of \$22,500.00 credit that alone is material. Its component parts are no concern either of court or jury. Either court or jury, as the case may be, will determine only the totality of damage, apply the credit and find the balance due, if any, under proper instructions by the court as suggested in *Aldridge*, if a jury trial.

We do not wish to be understood as repudiating the doctrine of *DeLude v. Rimek*, 351 Ill. App. 466, 115 N.E. 2d 561, that the court should apply the credit pro tanto after judgment. Either method may appropriately be used under appropriate circumstances and appropriate pleadings. Here the plaintiff, by her pleadings, has made the issue and is bound by them. We apprehend there may

The first is a matter of law, and the second is a matter of fact. The first is a matter of law, and the second is a matter of fact.

In the case at bar, the plaintiff alleges a liability to the defendant.

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The defendant denies the plaintiff's allegations, and claims that the plaintiff is not entitled to recover.

The plaintiff's evidence is sufficient to establish the liability of the defendant.

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The plaintiff's evidence is sufficient to establish the liability of the defendant.

be circumstances where the principle of DeLude will accomplish justice where that of Aldridge may not. In either event, the trial court must be alert to the proper use of the principle that it may not be used as a devastating trial tactic by either side.

We are fully aware that there is language in the cases above cited and in others which appears to militate against the conclusion we reach. Through them all runs the theme that it is abhorrent to natural as well as man made justice that there should be a double recovery for the same injury. On that platform they properly stand. On that same platform we too stand. None of them, so far as we can ascertain, were confronted with the factual actuality, as we are, that there can be no double recovery under the allegations of the instant complaint. What the end result in this case may be we do not even conjecture. Suffice it to say that the totality of injury dollar-wise, reduced by payments already made for the same injury, with an alleged balance due ought and does present a triable issue. Judicial precedent does not present an impossible barrier which we can neither scale nor penetrate. Inherent in the prohibition against double recovery is the salutary thought that, under the law, there is and should be an adequate recovery for every injury. We deal with two statutes--statutes passed by our legislature to remedy, in a measure, the archaic principles and deficiencies of the common law. We approve the statement of Mr. Justice Cardozo in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350, 81 L. ed. 685 (1937) cited with approbation in *Zostautas v. St. Anthony DePadua Hospital*, 23 Ill. 2d 326, 334, 178 N.E. 2d 303. He said: "It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied." Defendant Dram Shop operator seeks to exculpate herself through the benefaction of others under a statute which does not concern her. She seeks to crawl under the protective umbrella of an act designed to affect only

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proper use of the evidence that it may not be used as a substitute for a

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others. Her liability is under the Dram Shop Act, and only under it, Cunningham v. Brown, noted above. She is unharmed. She is not hurt. She will bear no additional burden dollar-wise. She will bear only that loss of support up to a maximum of \$20,000.00 which the evidence will sustain. This the legislature has said she should do.

We necessarily conclude that the motion and the affidavits in support thereof are insufficient as a matter of law to support the judgment in bar. Accordingly, this cause must be reversed and remanded to the trial court with directions to deny the motion for summary judgment and to proceed in conformity with the views herein expressed.

¶ Reversed and remanded with directions.

¶ McNEAL, P. J., and DOVE, J., concur.

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Gen. No. 11684

March 19, 1963

The Court has this day entered the following order in the case of:

Jacqueline L. Slone, Administrator, etc. v. Eva G. Morton

Opinion modified and petition for rehearing denied.

PAUL V. WUNDER,
Clerk

(NOTE:

For your convenience, a copy of the Court's order showing the changes is enclosed herewith, together with a copy of the final page of this opinion as ordered changed. Kindly make such substitution and correction in the opinion heretofore sent you, as are necessary.)



BE IT REMEMBERED, That, to wit: On the 19th day of March, A.D. 1963

certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz.:

Jacqueline L. Slone, Administrator of
the Estate of Clyde Von Slone, deceased,

Appellant

Appeal from the

11684 vs.

Circuit Court of

Eva G. Morton,

Peoria County,

Appellee

Now on this day this cause coming on for hearing upon the petition for a rehearing filed herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that the final paragraph of the opinion of this Court heretofore filed herein, on, to-wit: February 19, 1963, be stricken and deleted therefrom, and instead and in lieu thereof, the following be inserted:

We necessarily conclude that the motion and the affidavits in support thereof are insufficient as a matter of law to support the judgment in bar. The trial court therefore erred in denying the plaintiff's motion to vacate the judgment and for leave to file an amended complaint. Accordingly, this cause must be reversed and remanded to the trial court with directions to grant the plaintiff's motion to vacate the judgment and for leave to file the proposed

Corrections sent to [unclear] 11/3

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amended complaint, vacate the judgment in bar and to proceed in conformity with the views herein expressed.

And it is further ordered by the Court that the word "are" in line 8 on page 6, of said opinion, be stricken.

And it is further ordered by the Court that said petition for a rehearing herein, be and the same is hereby overruled and denied.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

PAUL V. WUNDER
I, ~~JUSTUS L. JOHNSON~~, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do
hereby certify that the foregoing is a true full and complete ~~copy of Certain Proceedings~~

.....
of the said Appellate Court in the above entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this.....19th.....day of
.....March.....in the year of our Lord one thousand

nine hundred and ~~xxx~~.....sixty-three.....

Paul V. Wunder

Clerk of the Appellate Court.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a term of the Appellate Court, begun and held
at Ottawa, on Tuesday, the 5th day of February, in the
year of our Lord one thousand nine hundred and sixty-
three, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable DAN H. McNEAL, Presiding Justice

Honorable SAMUEL C. SMITH, Justice

Honorable FRANKLIN R. DOVE, Justice

PAUL V. WUNDER, Clerk

JAMES A. CALLAHAN, Sheriff



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